EDITOR'S NOTE

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85-1267

Title: Interstate Commerce Commission, Petitioner
v.
Texas, et al.

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Burk,Robert S.

Counsel for respondent: Laurent,Larry Joseph, Solicitor General, Batchelder,Robert B., Rodriguez,Fernando

try	Date	Note	Proceedings and Orders
1	Jan 21 1986	G	Petition for writ of certiorari filed.
2	Jan 21 1986		Appendix of petitioner ICC filed.
3	Feb 5 1986		Waiver of right of respondent United States to respond filed.
4	Feb 21 1986		Brief of respondent Texas in opposition filed. VIDED.
5	Feb 26 1986		DISTRIBUTED. March 21, 1986
6	Feb 26 1986		REDISTRIBUTED. March 21, 1986
7	Mar 7 1986	X	Reply brief of petitioner ICC filed.
8	Mar 11 1986		Response requested of Solicitor General.
11	Apr 9 1986		Order extending time to file response to petition until May 11, 1986.
12	Apr 9 1986		Above extension applies to the Solicitor General.
13	May 13 1986		REDISTRIBUTED. May 29, 1986
14	May 13 1986		REDISTRIBUTED. May 29, 1986
15	May 13 1986	X	Memorandum of respondent United States filed. VIDED.
16	Jun 2 1986		Petition GRANTED. The case is consolidated with 85-1267, and a total of one hour is allotted for oral argument. **********
18	Jul 12 1986		Order extending time to file brief of petitioner on the merits until August 1, 1986.
19	Jul 31 1986		Brief of petitioners Missouri Kansas Texas RR Co., et al. filed. VIDED.
20	Aug 1 1986		Brief of petitioner ICC and United States (T&P) filed.
21	Aug 1 1986		Joint appendix filed. VIDED.
22	Aug 4 1986		Record filed.
23	Aug 4 1986		Certified copy of original record and proceedings, 3 volumes, received.
24	Aug 11 1986		Brief of petitioners ICC and United States filed. VIDED.
25	Aug 11 1986	G	Motion of the Solicitor General for divided argument filed.
27	Aug 27 1986		Order extending time to file brief of respondent on the merits until September 15, 1986.
28	Sep 15 1986		Brief of respondent Texas filed. VIDED.
29	Sep 24 1986		Motion of the Solicitor General for divided argument GRANTED.
30	Sep 22 1986		CIRCULATED.
31	Oct 6 1986		SET FOR ARGUMENT. Wednesday, December 10, 1986. This case is consolidated with No. 85-1267. (4th case)(1 hr.)
32	Nov 26 1986	X	Reply brief of petitioners Missouri-KS-TX RR Co., et al. filed. VIDED.
33	Nov 28 1986		Reply brief of petitioner ICC filed.

85-1222-CFX

	Date	Note	Proceedings anc Orders
	Dec 10 1986		ARGUED.

No. 85-1222

Supreme Court, U.S.
FILED
JUL 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Section 10505 of the Interstate Commerce Act requires ICC to exempt "transportation provided by a rail carrier" from regulation when the ICC finds that certain statutory criteria are met. The ICC (with the approval of another panel of the United States Court of Appeals for the Fifth Circuit) exempted from regulation interstate trailer-on-flatcar and container-on-flatcar (TOFC/COFC) rates and service, including the truck portion of such service, when it is provided by a railroad in its own trucks. Sections 10501 and 11501 of the Act explicitly pre-empt state regulatory authority over such "transportation" and mandate that states may be delegated to regulate it, if at all, in accordance with uniform federal standards. Under settled precedent, ICC decisions (including exemptions) are fully applicable to intrastate "transportation" under these pre-emptive provisions. The questions presented are:

(1) Whether the court of appeals erred by equating intrastate transportation service performed in railroad-owned trucks with "motor carriage" as defined in the Interstate Commerce Act, and accordingly holding that the ICC's jurisdiction to exempt "transportation provided by a rail carrier" is narrower for *intrastate* TOFC/COFC service provided by interstate rail carriers than for identical *interstate* service by the same carriers and is instead limited to transportation on rail cars, contrary to prior decisions of this and other courts.

(2) Whether any interpretation of the ICC's statutory jurisdiction in such a way as to define

"transportation provided by a rail carrier" differently for interstate and intrastate service is fundamentally incompatible with the express scheme of the Staggers Act—that such transportation be regulated to the same extent and under the same standards whenever provided by a carrier subject to ICC regulation, regardless of whether the service involved is interstate or intrastate.

PARTIES TO THE PROCEEDING

The following parties appeared in the proceedings before the court of appeals:

Missouri-Kansas-Texas Railroad Company
Southern Pacific Transportation
Road-Rail Company
Missouri Pacific Railroad Company
Interstate Commerce Commission
United States of America

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Interstate Commerce Commission petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a, *infra*) is reported at 770 F.2d 452 (1985). The decisions of the Interstate Commerce Commission (App. 16a, 24a, *infra*) are unreported.

JURISDICTION

The judgments of the court of appeals (App. 8a, 10a, *infra*) were entered on September 6, 1985. A subsequent order (App. 12a, *infra*) denying rehearing and rehearing *en banc* was entered on November

15, 1985. The court of appeals also stayed its mandate through January 21, 1986 (App. 14a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act, 49 U.S.C. 10101a, 10501, 10505, 11501, and 10521 are set forth at App. 30a, *infra*.

STATEMENT

1. This case concerns the application to intrastate transportation provided by interstate rail carriers of an exemption from regulation granted by the Interstate Commerce Commission under 49 U.S.C. 10505. Under Section 10505, the Commission "shall exempt" rail transportation "when the Commission finds that the application of a provision of this subtitle . . . is not necessary to carry out the transportation policy of section 10101a" and either the rail transaction or service "is of limited scope" or the application of the statute "is not needed to protect shippers from the abuse of market power." 49 U.S.C. 10505(a).

The duty to carry deregulation of rail transportation beyond the areas expressly removed from the ICC jurisdiction by statute was first imposed on the Commission in the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, § 207, 90 Stat. 21 (1976), which was enacted in an attempt to remedy the rail industry's precarious financial condition.[1] Originally, the stat-

[1] The Commission exercised the power by exempting rail movements of fresh fruit and vegetables, which were subject to intense motor carrier competition. *Rail General Exemption Authority-Fresh Fruit and Vegetables*, 361 I.C.C. 374 (1979).

ute allowed only exemptions of services or transactions by reason of "the[ir] limited scope." Ibid. The 4R Act's reforms were inadequate to remedy the rail industry's financial problems, however. Congress therefore enacted more sweeping reforms in the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895 *et seq.* (1980).

Those reforms included further eliminating by statute the Commission's jurisdiction over specified aspects of rail transportation,[2] and as relevant here, expanding the exemption power beyond rail matters of "limited scope" and specifically directing the Commission to use that power to deregulate in areas beyond those explicitly deregulated by the statute. The legislative history of the exemption provision confirms that the Commission was to remove "as many as possible of the Commission's restrictions on changes in prices and services" and to "adopt a policy of reviewing [rail] carrier actions after the fact to correct abuses of market power." H.R. Conf. Rep. 96-1430, 96th Cong. 2d Sess. 105 (1980). Regulation was to be reduced to the levels necessary "to protect against abuses of market power where other federal remedies are inadequate for this purpose." *Id.* Congress viewed the mandate to exempt additional aspects of rail transportation as an "important cornerstone" of the Staggers Act and a key element in the effort to obtain greater reliance on the marketplace. H.R. Rep. 96-1035, 96th Cong., 2nd Sess. 60

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[2] For example, Congress further confined the Commission's jurisdiction to non-competitive ("market dominant") rates (49 U.S.C. 10701a and 10709). It also created a zone within which rates are insulated from regulation, and a fast mechanism for railroads to recover cost increases without regulatory interference (Section 10707a).

(1980). As the Act's sponsor and namesake confirmed on the floor of the House (126 Cong. Rec. H10085 (daily ed. Sept. 30, 1980) (emphasis added)):

> This legislation . . . is to be a first step toward treating the American railroad industry as any other business which is best "regulated" by the marketplace.
>
> The exemption authority has been carefully drafted to limit regulation to the bare essentials necessary to protect against abuse of market power. *It is the intent of the conference committee that this standard would permit the exemption of any provision in the act, except as specified in the exemption section.*

The Commission's first post-Staggers Act exercise of the expanded exemption power was in an area to which Congress had specifically adverted (in 49 U.S.C. 10505(f)) as appropriate for exemption—railroad-provided intermodal transportation. *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 73 (1981). That first step was substantially affirmed in *American Trucking Ass'ns v. ICC*, 656 F.2d 1115 (5th Cir. 1981) ("*ATA II*").

The ICC rested its 1981 TOFC/COFC exemption decision on the statutory language in the Staggers Act's exemption provision, which permits exemption of any "matter relating to a rail carrier providing transportation," 49 U.S.C. 10505(a), and explicitly encompasses "transportation that is *provided by a rail carrier* as part of a continuous intermodal movement," 49 U.S.C. 10505(f) (emphasis added).

Those challenging the exemption rule contended, *inter alia*, that the exemption was invalid because

the Commission's exemption authority applied only to rail carriage, and that the agency had no authority to exempt motor carriage. Relying on 49 U.S.C. 10505(f),[3] however, the *ATA II* decision unequivocally rejected this contention, holding (656 F.2d at 1120) that:

> rail-owned truck TOFC/COFC service is "transportation provided by a rail carrier." Had Congress intended to limit the Commission's exemption authority to rail transportation, it could easily have done so by using that language. Instead, it chose the broad "transportation-that-is-provided-by-a-rail-carrier" language and presumably did so with knowledge that it previously had defined "transportation" to include the movement of passengers or property by motor vehicle [citations and footnote omitted].

2. Besides broadening the Commission's exemption powers, the Staggers Act fundamentally altered the boundary between state and federal regulation of rail transportation.

Before the Staggers Act, the state regulatory bodies had initial responsibility for intrastate rail regulation, and the Commission could preempt a state's authority and prescribe an intrastate rate, after a hearing, in only two situations: (1) when an intrastate rate required by the state unjustly discriminated against or imposed an undue burden on inter-

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[3] Section 10505(f) provided that: "The Commission may exercise its authority under this section to exempt *transportation that is provided by a rail carrier* as part of a continuous intermodal movement" (emphasis added). The *ATA II* court also held the TOFC exemption to be a "matter related to a rail carrier" under Section 10505(a), and thus within the ICC's lawful exemption authority.

state commerce; or (2) when the state was dilatory in acting upon a proposed intrastate rate change. See Section 13(4) of the former Interstate Commerce Act, recodified as 49 U.S.C. 11501 by the Act of October 7, 1978, Pub. L. No. 95-473, 94 Stat. 1444. The ICC usually exercised its Section 11501 powers when railroads sought relief after state agencies refused to authorize intrastate rate increases commensurate with ICC-approved interstate general increases.[4] In those cases, the Commission generally awarded relief from the intrastate rate holddowns.

In the Staggers Act, Congress adopted a new rail transportation policy aimed at eliminating burdensome government regulation and "allowing rail carriers to earn adequate revenues, *as determined by the Interstate Commerce Commission*" (emphasis added). 49 U.S.C. 10101a(a)(3). This new policy also requires the Commission "to assure that intrastate regulatory jurisdiction is exercised in accordance with the [federal] standards." 49 U.S.C. 10101a(a)(9). To implement this directive, Congress enacted Section 214 of the Staggers Act[5] "to ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals." H.R. Conf. Rep. No. 96-1430, *supra* at 106.

Congress concluded that burdensome state regulatory policies had prevented intrastate traffic from

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[4] See *e.g.*, *Montana Intrastate Freight Rates and Charges—1977*, 357 I.C.C. 281 (1978); *Montana Intrastate Rail Freight Rates and Charges*, 353 I.C.C. 207, 213 (1976); *West Virginia Intrastate Rates and Charges, 1973*, 355 I.C.C. 823 (1977).

[5] Pub. L. 96-448, 94 Stat. 1913 (1980).

paying its "fair proportionate share" of the cost of the national railroad system. The House Commerce Committee estimated, for example, that the nationwide disparity between intrastate and interstate rates cost rail carriers $400 million in 1977 alone. H.R. Rep. No. 96-1035, *supra* at 61. That disparity had two basic causes. First, the regulatory standards and procedures of the various states differed substantially from one another and from those of the Commission. *Id.* at 128-30. As a result, the railroads often obtained a substantial increase in interstate rates from the Commission, only to have the same increase denied by state regulatory authorities on intrastate movements.

A second and more basic cause of the disparity was sheer regulatory delay. Even though the 4R Act had required state agencies to act on rate matters within 120 days, state activities nevertheless resulted in revenue drains on the carriers, because even when the Commission eventually overturned a state decision holding down rates, the railroad still lost revenues from the time lag involved. *Id.* at 61.

As summarized by the Seventh Circuit, "[t]he Staggers Rail Act . . . effected a basic change in the regulatory spheres of state agencies and the ICC. Congress perceived a great disparity between interstate and intrastate rail rates, caused partly by a lack of uniform standards and partly by state regulatory delay [footnote omitted]." *Indianapolis Power and Light Co. v. ICC*, 687 F.2d 1098, 1100 (7th Cir. 1982).

In particular, the Staggers Rail Act amended the Interstate Commerce Act to provide that "a State authority may only exercise jurisdiction over intrastate *transportation provided by a rail carrier* . . .

if such State authority exercises such jurisdiction exclusively in accordance with" the Interstate Commerce Act. 49 U.S.C. 11501(b)(1) (emphasis added). Certification is the means by which states may opt to exercise delegated jurisdiction to administer the regulatory standards of the Interstate Commercial Act. States must "either . . . regulat[e] in compliance with federal law or . . . cease independent regulation altogether." *State of Texas v. United States*, 730 F.2d 339, 353 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 267 (1984). Accord, *Illinois Commerce Commission v. ICC*, 749 F.2d 875, 878 n. 5 (D.C. Cir. 1984), *cert. denied*, 106 S. Ct. 70 (1985). See H. Conf. Rep. No. 96-1430, 96th Cong. 2d Sess. 83 (1980): "State authority over intrastate [rail] transportation is limited to administering the provisions of the Interstate Commerce Act."

Until May, 1984, the Railroad Commission of Texas (RCT) was provisionally certified, pending ICC action on its application for final certification.[6] States certified (finally or provisionally) to administer the Interstate Commerce Act are bound to follow and apply federal "standards and procedures." 49 U.S.C. 11501(b)(1).

Only certified states are permitted to regulate "transportation provided by a rail carrier." 49 U.S.C. 11501(b)(1),(4)(A). If a state does not receive federal certification, "[a]ny intrastate trans-

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[6] For a description of the legal effect of provisional certification, see *Illinois Central Gulf R.R. Co. v. ICC*, 720 F.2d 958 (7th Cir. 1983); *Utah Power & Light Co. v. ICC*, 747 F.2d 721, 726 (D.C. Cir. 1984), *supplemented on rehearing*, 764 F.2d 865 (D.C. Cir. 1985); *Railroad Commission of Texas v. ICC*, 765 F.2d 221, 227-8 n.5 (D.C. Cir. 1985).

portation provided by a rail carrier . . . shall be deemed to be transportation subject to the jurisdiction of the Commission under [Sections 10501 *et seq.*]" 49 U.S.C. 11501(b)(4)(B). Thus, while certified states are permitted to exercise *delegated* pre-emptive jurisdiction (using uniform federal standards) "as a matter of legislative grace," [7] a state that fails to obtain federal certification must "cease independent regulation altogether" [8] and is pre-empted as to the full extent of intrastate transportation provided by interstate rail carriers. *Illinois Commerce Commission, supra*, 749 F.2d at 878 n.5.

Two major themes of the Staggers Act—deregulation through exemption and state-federal uniformity of standards through pre-emption—reached a confluence in the present case. The TOFC/COFC exemption, granted by the ICC in 1981, was repudiated in part by the Railroad Commission of Texas (RCT). Specifically, RCT refused to recognize the ICC's federal regulation [9] as exempting the entire intrastate TOFC/COFC movements of major interstate rail carriers, Missouri-Kansas-Texas Railroad Company (MKT), Burlington Northern Railroad Company (BN), Southern Pacific Transportation Company (SP), and Road Rail Corporation. Instead the RCT stated that only the rail portions of such intermodal movements would be deemed exempt.

The affected interstate rail carriers then invoked the expedited administrative review procedure of 49

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[7] *Illinois Commerce Commission, supra*, 749 F.2d at 878.

[8] *State of Texas, supra*, 730 F.2d at 353.

[9] By its terms, the TOFC/COFC exemption as codified in the ICC's regulations encompasses "[r]ailroad and truck transportation provided by a rail carrier as part of a continuous intermodal movement." 49 C.F.R. 1039.13 (1984).

U.S.C. 11501(c) to seek redress from the ICC. In two separate orders, the Commission held that the full scope of the pre-existing federal TOFC/COFC exemption was a "federal standard" fully binding on RCT under the pre-emptive scheme of the Staggers Act (App. 16a-23a, 24a-29a, *infra*). RCT then sought review in the Fifth Circuit.

3. The court of appeals reversed the Commission's orders, holding that "exemption from state and federal regulation [of] intrastate trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) activity done in conjunction with intrastate rail transportation . . . went beyond the scope of the [ICC's] authority granted by Congress" (App. 2a, *infra*). The court of appeals began with the premise that the "predicate" for ICC jurisdiction is "the interstate or foreign aspect of rail transportation" (App. 4a, *infra*), observing that the statutory provision conferring "motor carrier" jurisdiction [10] upon the ICC "totally excludes intrastate motor carrier transportation" (App. 4a, *infra*). While assertedly recognizing that the Staggers Act had "given [the ICC] jurisdiction over intrastate rail traffic," the court refused to recognize any ICC authority "to exempt intrastate trucking connected with intrastate rail travel" (App. 6a, *infra*).

The principal rationale advanced by the court of appeals for excising the motor portion of an intrastate TOFC/COFC movement from pre-emptive federal authority was that a "small intrastate rail carrier" could provide "transportation by motor carrier across the entire State of Texas, except for a few [rail] miles" within San Antonio, "but be completely

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[10] 49 U.S.C. 10521.

free of regulation by state authorities" (App. 7a, *infra*). The court again relied on 49 U.S.C. 10521 (b)(1), which preserves the "power of State to regulate transportation provided by a motor carrier" (App. 7a, *infra*). The court of appeals never mentioned Sections 10501(d) or 11501(b)(4)(B), despite the expressly preemptive language of these provisions.

The Commission and the United States, as well as the affected carriers, petitioned for rehearing *en banc*. These petitions were denied by the Fifth Circuit on November 15, 1985 (App. 12a, *infra*).

REASONS FOR GRANTING THE PETITION

1. The Staggers Act is intended to promote a new regime of less stringent regulation of the railroad industry. Two of the most important means provided by Congress to achieve this goal were the ICC's expanded exemption power, 49 U.S.C. 10505 (an "important cornerstone" [11] of the Act) and the pre-emptive mandate to assure that both interstate and intrastate traffic are regulated "exclusively" under uniform federal "standards and procedures," 49 U.S.C. 10501(d), 11501(b)(1). The court of appeals' decision thwarts the effective use of these deregulatory tools by permitting a narrower, state-determined jurisdictional definition of "transportation provided by a rail carrier" to limit the scope of uniform federal standards for intrastate TOFC/COFC shipments by

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[11] H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 60 (1980). The exemption power is the "key mechanism" by which the "deregulatory mandate of the Staggers Act" is to be implemented. *ICC v. Coal Exporters Ass'n*, 105 S. Ct. 2151, 2152 (1985) (White & Rehnquist, JJ., dissenting).

interstate rail carriers. Because uniformity of the jurisdictional boundary, erroneously redrawn by the court of appeals, is fundamental to the administration of the Interstate Commerce Act at both the interstate and intrastate levels, review by this Court is necessary to prevent the state-sponsored dismemberment of the uniform regulatory standards and basic deregulatory exemptions mandated by Congress in the Staggers Act. The Fifth Circuit's ruling also places that court in conflict with prior decisions of the Sixth, Seventh and District of Columbia Circuits on the scope of the TOFC/COFC exemption and on the pre-emptive reach of the Staggers Act.

Review of the erroneous ruling below is especially necessary here. Because the court of appeals cast its ruling as a jurisdictional limit on the Commission's statutory power, there is no other means available to the Commission to redress or mitigate the damage caused by the Fifth Circuit's ruling. Moreover, inasmuch as Texas has been denied federal certification to administer the regulatory standards of the Interstate Commerce Act,[12] the ICC is not even able to readdress the matter in the exercise of its supervisory jurisdiction, 49 U.S.C. 11501(b), (c). And since the critical jurisdictional language ("transportation provided by a rail carrier") recurs throughout the federal statute,[13] the damaging effect of the Fifth Circuit's ruling is not confined to TOFC/COFC traffic or to pre-empted intrastate rail jurisdiction.

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[12] See *State Intrastate Rail Rate Authority-Texas*, 1 I.C.C.2d 26 (1984), *aff'd sub nom. Railroad Commission of Texas v. ICC*, 765 F.2d 221 (D.C. Cir. 1985).

[13] *See, e.g.*, 49 U.S.C. 10701(a) (requirement that rates be reasonable); 10701a(a) (carrier control over rate-setting); 10701a(c) (standard for minimum rates).

2. The court of appeals erroneously equated the movement of a trailer or container by railroad-owned trucks as part of a through service with "motor carrier transportation" (App. 4a, 7a, *infra*) citing 49 U.S.C. 10521, the ICC's general jurisdiction over interstate motor carriers. In so doing, the court of appeals ignored the settled principle, approved in prior decisions of this Court, that through service performed in part in railroad-owned trucks is not "motor carriage" within the meaning of the federal statute.

Long before the Staggers Act, the Interstate Commerce Act embodied a fundamental distinction between "rail carriers" and "motor carriers." The latter, in fact, were added to the ICC's regulatory judgdiction only in 1935, almost fifty years after the Commission's original rail jurisdiction was established by Congress. This Court early recognized, for example, that a railroad may use trucks as part of a "single complete freight transportation service to and from all points on its lines" without becoming a motor common carrier within the meaning of the Interstate Commerce Act. *Thomson v. United States*, 321 U.S. 19, 24-25 (1944).

Later, as use of continuous truck-rail movements under railroad control increased, this Court sustained the ICC's assertion of regulatory authority over "piggyback" rail service, the forerunner of TOFC/COFC movements, *American Trucking Ass'ns v. A.T. & S.F. Ry. Co.*, 387 U.S. 397, 420-21 (1967) ("*ATA I*"), recognizing that:

> Railroads are not now confined to rails. They operate trucks. They are permitted to assemble cargo and, if they so desire, to use their own trucks or subsidiary companies to do so.

Thus, even without considering the broader "transportation-provided-by-a-rail-carrier" language of the Staggers Act, the court of appeals' decision is fundamentally erroneous and contrary to prior decisions of this Court, because it fallaciously equates railroad-owned truck connecting service with "motor carriage."

3. As one of its most basic goals in the Staggers Act, Congress sought to assure that uniform regulatory standards would be applied to all railroad transportation, intrastate and interstate. The action of the court of appeals in this case subverts this congressionally intended uniformity at its very core—the basic jurisdictional definition of "transportation provided by a rail carrier." If a state agency such as RCT (and an uncertified one at that) may remove part of a continuous railroad-provided transportation service from federal jurisdiction by redefining it as "motor carriage," then the statute (and the growing body of precedent) holding certified states bound by the federal standards (as well as ICC regulations and case law) is meaningless: the state may simply avoid application of the federal standards by altering its reading of "transportation provided by a rail carrier" to suit its own preferences and sensibilities. Moreover, if railroad-owned trucks are considered not to be engaged in "transportation provided by a rail carrier" when they connect with rail service in a continuous intermodal movement, two disparate regulatory regimes are then imposed on identical railroad-provided transportation service, depending solely upon whether the destination lies beyond a state border. Such a duality of regulatory standards is precisely what Congress intended to eradicate in the Staggers Act.

The TOFC/COFC exemption and the "transportation provided by a rail carrier" it addresses include rail and truck service furnished by a rail carrier as part of a continuous intermodal movement. 49 C.F.R. 1039.13 (1984); *ATA II*, *supra*, 656 F.2d at 1120 & n.5. The Commission's exemption power, as expanded by the Staggers Act, explicitly extends to such continuous intermodal service. 49 U.S.C. 10505(f).[14]

The unitary "provided-by-a-rail-carrier" nature of ICC jurisdiction over TOFC/COFC traffic (truck and rail) has been twice confirmed in recent judicial decisions. First, the Fifth Circuit upheld the original exemptive regulations in *ATA II* (656 F.2d at 1120), holding Section 10505(f) to mean that:

> rail-owned truck TOFC/COFC service is "transportation provided by a rail carrier." Had Congress intended to limit the Commission's exemption authority to rail transportation, it could easily have done so by using that language. Instead, it chose the broad "transportation-that-is-provided-by-a-rail-carrier" language and presumably did so with knowledge that it previously had defined "transportation" to include the movement of passengers or property by motor vehicle [citations and footnote omitted].

Later the Seventh Circuit affirmed a ruling that a dispute over the lawfulness of railroad-affiliated *truck*

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[14] Indeed, the TOFC/COFC exemption, already proposed but not adopted at the time of the congressional deliberations on the Staggers Act, was specifically mentioned in the House report as evidence that the "Commission has proceeded on a sound basis given the existing statutory restrictions, easing unnecessary regulatory restrictions and providing an improved competitive environment." H.R. Rep. No. 96-1035, *supra*, at 60.

service conducted under color of the TOFC/COFC exemption was within the primary jurisdiction of the ICC, since the exemption encompasses "*rail* and *truck* transportation *provided* by a rail carrier." *Hansen v. Norfolk & Western Ry. Co.*, 689 F.2d 707, 712 (7th Cir. 1982) (emphasis added). The *Hansen* decision, like *ATA II*, recognized that the basic statutory test for TOFC/COFC exemption coverage is whether the transportation is "provided" by a rail carrier. 689 F.2d at 712 n.5. Thus, two courts of appeals have previously recognized that the providing of the service by a rail carrier—not the physical location of the trailer or container on rails or a highway—determines the jurisdictional status of the transportation. Yet the decision below contradicts both of those prior decisions by limiting the coverage of the statute to the rail segment of the journey only.

4. The decision below held that "transportation provided by a rail carrier" has a narrower meaning as to intrastate TOFC/COFC traffic than as to interstate traffic of the same type (App. 5a-6a, *infra*). Yet the District of Columbia Circuit held in *Public Service Co. of Indiana v. ICC*, 749 F.2d 753, 769 (D.C. Cir. 1984), *cert. denied*, 106 S. Ct. 278 (1985), that even where the ICC has not issued any implementing regulations, the Staggers "Act itself established federal standards that must be observed" (citations omitted). The uniform meaning of substantive statutory provisions as upheld in *Public Service* cannot be squared with the Fifth Circuit's creation of a separate and narrower definition of "transportation provided by a rail carrier" solely for intrastate movements.

5. The disparity in treatment of intrastate and interstate TOFC/COFC service mandated by the decision below also conflicts with a prior decision of the

District of Columbia Circuit in *Illinois Commerce Commission, supra.* There the state agency disputed the ICC's authority to require the state to give "immediate and automatic effect to federal exemptions." 749 F.2d at 884. Specifically, the state claimed independent authority to decide whether intrastate TOFC/COFC traffic would be regulated or exempt. *State Intrastate Rail Rate Authority—P.L. 96-448*, 367 I.C.C. 149, 152-53 & n.11 (1983).[15] The ICC expressly found that differing treatment for intrastate and interstate TOFC/COFC movements would cause "practical problems and inconsistencies" that "could not have [been] intended" by Congress and "would cause unjustifiable operational and/or marketing difficulties for the railroads conducting business for the same class of traffic under both a regulated and unregulated environment." 367 I.C.C. at 153. The essential "competitive dynamic" underlying a class exemption such as TOFC/COFC is the same, whether the destination is intrastate or interstate. *Id.*

The District of Columbia Circuit upheld the ICC's ruling on the exemption issue as a "reasonable interpretation" of the Staggers Act to avoid "continued State regulation that would frustrate federal deregulation efforts pursuant to an exemption order." *Illinois, supra*, 749 F.2d at 883. This holding cannot be squared with the decision below, which reserves to Texas not only independent discretion over part of a federally exempted movement, but allows the state to

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[15] Illinois merely claimed the authority to grant or deny an intrastate TOFC/COFC exemption using *federal* Section 10505 statutory criteria. 367 I.C.C. at 152. RCT (and now the Fifth Circuit), on the other hand, asserted that *state* law (and hence plenary state jurisdiction) applies to the motor segment of a TOFC/COFC movement.

exercise that discretion without regard to any federal law—something that even Illinois never asserted the power to do. (See note 15, *supra.*) If a certified Illinois lacks the legal authority under the Staggers Act to reevaluate a federal exemption using federal (Section 10505) criteria, then an uncertified Texas *a fortiori* cannot repudiate a portion of the exemption in reliance upon state law.

6. The TOFC/COFC exemption as adopted by the ICC is a codified federal regulation, 49 C.F.R. 1039.13 (1984). The decision below holds that regulation nonbinding as to RCT's authority to regulate railroad-owned trucks participating in continuous intrastate TOFC/COFC movements on the "highway portion of the travel" (App. 2a-3a, *infra*). Thus, the scope of the federal regulation is severely reduced as to intrastate traffic. That holding is contrary to several earlier court of appeals decisions holding that all substantive ICC regulations (as well as statutory provisions and decisional precedent) are binding on certified [16] states. All ICC substantive regulations are binding on certified states. *State of Texas v. United States*, 730 F.2d 409, 418-19 (5th Cir. 1984), *amended on rehearing*, 749 F.2d 1144 (5th Cir. 1985), *cert. denied*, 105 S.Ct. 3513 (1985) (contract rate rules applicable on intrastate traffic); *Utah Power & Light Co. v. ICC*, 747 F.2d 721, 736-37 (D.C. Cir. 1984), *supplemented on rehearing*, 764 F.2d 865 (D.C. Cir. 1985) (revenue adequacy regulations binding on states). Even ICC adjudicatory precedent must be followed by cer-

[16] As noted earlier, RCT was provisionally certified when the present case arose but had been denied certification (and hence ousted from intrastate rail jurisdiction) when the Fifth Circuit heard the case. See App. 3a, *infra*, n.1; *Railroad Commission of Texas* v. *ICC, supra.*

tified states. *Illinois Central Gulf R.R. Co. v. ICC*, 702 F.2d 111 (7th Cir. 1983); *Wheeling-Pittsburgh Corp. v. ICC*, 723 F.2d 346 (3d Cir. 1983); *Utah Power*, *supra*. The obvious central purpose again, as in the Staggers Act itself, is uniformity of standards. Yet the decision below permits an uncertified state unilaterally to diminish the coverage of a federal exemptive regulation, so as to create two different regimes for interstate and intrastate traffic.

7. The Fifth Circuit justified construing "transportation provided by a rail carrier" more narrowly for intrastate traffic than for interstate traffic solely because of the "potential mischief" of having a "small intrastate rail carrier" provide minimal intra-urban rail service, enabling it to provide extensive connecting intrastate truck service without state rate regulation (App. 6a-7a, *infra*). The decision below erroneously assumes that the ICC has rail jurisdiction over the hypothetical[17] intra-San Antonio railroad. This assumption is plainly wrong. See, *e.g.*, *Magner-O'Hara Scenic Ry. v. ICC*, 692 F.2d 441 (6th Cir. 1982). Compare *Texas*, *supra*, 730 F.2d at 357 (emphasis added), which recognized that the Staggers Act's pre-emptive scheme is addressed to "regulat[ion] of the intrastate rates of *interstate* railroads." Yet the ICC's ability to exempt such an isolated intra-city railroad (and with it, connecting railroad-provided truck service) was the sole "mischief" requiring in the eyes of the Fifth Circuit a new definition of "transportation provided by a rail carrier" at the

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[17] In fact, all carriers involved in this case were sizable *interstate* carriers who performed TOFC/COFC service inside Texas. See App. 16a, 24a n.1.

intrastate level. This "mischief" is, under the holding of *Magner-O'Hara*, nonexistent.[18]

CONCLUSION

Review by this Court is necessary to correct the erroneous jurisdictional ruling of the Fifth Circuit and to eliminate the conflict between that court's decision below and the earlier decisions of the District of Columbia, Seventh and Sixth Circuits.

However, should this Court decide not to grant plenary consideration of this case, the clearly erroneous treatment of the transportation involved as "motor carriage," contrary to prior decisions of this Court, coupled with the other patent errors outlined above, merit summary reversal of the court of appeals' judgment.

The petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT S. BURK
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Interstate Commerce Commission

JANUARY 1986

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[18] The decision is *Magner-O'Hara* is consonant with *Illinois Commerce Commission, supra,* where the District of Columbia Circuit recognized that the Staggers Act does not affect states' power to regulate an "aspect of intrastate commerce [that] does not cause sufficient interstate effects to be deemed 'interstate commerce' within the meaning of the commerce clause." 749 F.2d at 878 n.4.

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No. 85-1222

Supreme Court, U.S.
FILED
JAN 21 1986
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS, RESPONDENT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 84-4169, 84-4386

STATE OF TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY, and
SOUTHERN PACIFIC TRANSPORTATION COMPANY,
INTERVENING-RESPONDENTS

THE STATE OF TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

ROAD-RAIL TRANSPORTATION COMPANY, INC.,
INTERVENING-RESPONDENT

Sept. 6, 1985

Jim Mattox, Atty. Gen., Justin Scott Wilson, Asst. Atty. Gen., Austin, Tex., for petitioner.

John Broadley, General Counsel, H. Glenn Scammel, I.C.C., Washington, D.C., John P. Legendre, Dallas, Tex., John J. Powers, III, John P. Fonte, Dept. of Justice, Antitrust Div., Washington, D.C., for respondents.

On Petitions for Review of
Interstate Commerce Commission
Decision Nos. 3962 and 39704

Before GARZA, POLITZ and DAVIS, Circuit Judges.

POLITZ, Circuit Judge:

The State of Texas seeks review of orders of the Interstate Commerce Commission, issued under 49 U.S.C. § 10505, granting exemptions from state and federal regulations to intrastate trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) activity done in conjunction with intrastate rail transportation. Concluding that the I.C.C. went beyond the scope of the authority granted by the Congress, we grant the petitions for review and reverse the challenged orders.

Facts

Several railroads operating in the State of Texas are engaged in the transportation of goods by combined rail and highway transportation. The rail carriers own trucks and using the TOFC and COFC rail/truck combination are able to contract with shippers for continuous carriage of goods between points whether served by rail or not. The entire rail portion of the transportation is intrastate. The entire highway portion of the transportation is intrastate.

The Railroad Commission of Texas asserted jurisdiction over these combination carriers because of the intrastate transportation of goods by rail. At the time these events occurred, Texas, along with most other states, had been given an interim or temporary certification by the I.C.C., authorizing it to regulate intrastate rail traffic. That certification has been terminated.[1]

After the I.C.C. exempted interstate TOFC and COFC activity from regulation, *see American Trucking Association v. I.C.C.*, 656 F.2d 1115 (5th Cir. 1981), two of the combination carriers petitioned the Railroad Commission of Texas for a similar exemption for intrastate operations. The Railroad Commission granted exemptions from regulation while the trailers and containers were being transported by rail but refused to exempt the highway portion of travel. The carriers sought relief from the I.C.C. which expanded the exemptions from regulation to cover all stages of the intrastate movement, both by rail and by motor carrier. It is those decisions, extending the exemption to totally intrastate highway transportation, that is the subject of the present petitions for review.

Analysis

The thrust of the argument of the State of Texas is that the I.C.C. lacks jurisdiction over the trucking segment of the totally intrastate TOFC activities of the intrastate rail carriers. Without this jurisdiction, Texas maintains, the I.C.C. could not exempt the in-

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[1] The I.C.C. decision terminating the temporary certification granted to Texas was recently affirmed by the Circuit Court of Appeals for the District of Columbia. *The Railroad Commission of Texas v. United States*, 765 F.2d 221 (D.C.Cir. 1985).

trastate highway transportation from state regulation. We are constrained to agree.

The general jurisdiction of the I.C.C. over rail transportation is contained in 49 U.S.C. § 10501. It cannot be gainsaid that the predicate for that authority is the interstate or foreign aspect of rail transportation. The reference in § 10501(a)(1) is to transportation by railroad and by two specific railroad and intermodal functions, not including TOFC and COFC rail/highway activity. Section 10501 was amended by the Staggers Rail Act of 1980, 94 Stat. 1895 (codified in scattered sections of 49 U.S.C.), but no changes were made to § 10501(a)(1). Section 10501(a)(2) makes abundantly clear that this grant of jurisdiction to the I.C.C. extends only to transportation having an interstate or foreign dimension, the transportation must originate in or traverse a sister state or foreign country.

The general jurisdiction of the I.C.C. over motor carrier transporation is found in § 10521. This section also contains the jurisdictional prerequisite of interstate or foreign travel and excludes totally intrastate motor carrier transportation. The language of subsection (b) specifically provides that except as to certain passenger and express services, not pertinent herein, the congressional grant of jurisdiction to the I.C.C. "does not affect the power of a State to regulate intrastate transportation provided by a motor carrier." 49 U.S.C. § 10521(b)(1).[2]

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[2] As most recently amended, 49 U.S.C. § 10521(b) provides:

This subtitle does not—

(1) except as provided in sections 10922(c)(2), 10935, and 11501(e) of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier;

The United States and the I.C.C. cite 49 U.S.C. § 10505, and our decision in *American Trucking Associations v. I.C.C.*, in support of the I.C.C. decisions. We find neither controls. Section 10505 authorizes the I.C.C. to exempt rail carriers from regulation. The introductory language of § 10505 belies respondents' contentions, for it specifically is limited to "transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter," the subchapter being 49 U.S.C. §§ 10501 *et seq.* As noted above, totally intrastate motor carriers are not subject to I.C.C. jurisdiction under this subchapter. Nor, we might add, under any other subchapter of this title.

Our decision in *American Trucking* does not direct a contrary conclusion. There the I.C.C. exempted interstate TOFC and COFC rail/truck transportation from regulation, and we affirmed, concluding that "the Commission had the authority under section 10505(a) to exempt motor carrier TOFC/COFC service provided by rail carriers." 656 F.2d at 1122. The rail travel in *American Trucking* was interstate; the motor carrier travel involved interstate transportation. In *American Trucking* we recognized that the I.C.C. properly exercised its authority to exempt from

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(2) except as provided in sections 10922(c)(2) and 11501(e), authorize the Commission to prescribe or regulate a rate for intrastate transportation provided by a motor carrier;

(3) except as provided in section 10922(c)(2) of this title, allow a motor carrier to provide intrastate transportation on the highways of a State; or

(4) except as provided in section 11503a and section 11504(b) of this title, affect the taxation power of a State over a motor carrier.

regulation that portion of rail and motor carrier transportation over which it had jurisdiction.

We are mindful that the I.C.C. has been given jurisdiction over intrastate rail traffic. A principal change occasioned by the Staggers Rail Act was the curtailment of the authority of the states to regulate that traffic. The I.C.C. has authority to exempt rail carriers from regulations. 49 U.S.C. § 10505(a). Once exempted by the I.C.C., rail carriers are not subject to any regulations. The I.C.C. has authority "to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement." 49 U.S.C. § 10505(f). But to accept uncritically the I.C.C.'s argument that it can exempt intrastate trucking connected with intrastate rail travel from all regulation would be to court potential mischief. A small intrastate rail carrier could transport goods, in a trailer capable of TOFC movement, from the point of origination to its terminal, which might be close or at a distance. The trailer then could be loaded on a flatcar and moved by rail a few miles and thereafter continue its journey anywhere within the State of Texas, totally exempt from any motor carrier regulation. Extending the worst case scenario, one might envision a small intrastate railroad which operates many trucks. A trailer load is picked up by truck at Orange, Texas and transported hundreds of miles to the intrastate rail carrier's terminal on the eastern fringe of San Antonio. There the trailer is placed on a flatcar and transported across the city to a terminal on the western edge of that city. At that point, the trailer is removed from the flatcar, attached to a cab (perhaps the same one), and driven additional hundreds of miles across Texas highways to El Paso. That movement of goods would involve

transportation by motor carrier across the entire State of Texas, except for the few miles across the city of San Antonio, but be completely free of regulation by state authorities.

We are not persuaded that in passing either the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31, or the Staggers Rail Act, or accompanying legislation, Congress intended to prohibit the states from regulating motor carriers that operate totally intrastate. The language in the statutes both before and after the recent amendments clearly indicates the contrary. In 1982 Congress amended 49 U.S.C. § 10521(b)(1) which previously provided simply: "This subtitle does not affect the power of a State to regulate intrastate transportation provided by a motor carrier." Congress created three exceptions which now affect the power of the states over intrastate mtor carrier transportation. None of these exceptions involve intrastate trucking by intrastate rail carriers in an intermodal setting. If Congress had intended to change the power of the states to regulate that activity, it could, and presumptively would, have added a fourth exception to the power of the states to regulate intrastate transportation by motor carriers. The Congress chose not to do so.

We conclude that intrastate transportation by a motor carrier, even if done in conjunction with a measure of intrastate rail transportation in the TOFC/COFC intermodal setting, is subject to regulation by the states. The I.C.C. exceeded its jurisdiction when it exempted intrastate rail carriers from all regulation of their totally intrastate motor carrier activities.

The petitions for review are GRANTED. The orders are REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4169

ICC No. 39627

STATE OF TEXAS, PETITIONER

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY and
SOUTHERN PACIFIC TRANSPORTATION COMPANY,
INTERVENING-RESPONDENTS

On Petition for Review of
Interstate Commerce Commission
Decision No. 39627

Before GARZA, POLITZ, and DAVIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of the State of Texas for review of an order of the Interstate Commerce Commission and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order

of the Interstate Commerce Commission in this cause is reversed, and the cause is remanded to the Commission for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that respondents and intervening-respondents pay to petitioner the costs on appeal, to be taxed by the Clerk of this Court.

September 6, 1985

Issued as Mandate:

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4386

ICC No. 39704

STATE OF TEXAS, PETITIONER

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

ROAD-RAIL TRANSPORTATION COMPANY, INC.,
INTERVENING-RESPONDENT

On Petition for Review of
Interstate Commerce Commission
Decision No. 39704

Before [illegible], POLITZ, and DAVIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of the State of Texas for review of an order of the Interstate Commerce Commission and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Interstate Commerce Commission in

this cause is reversed, and the cause is remanded to the Commission for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that respondent and intervening-respondent pay to petitioner the costs on appeal, to be taxed by the Clerk of this Court.

September 6, 1985

Issued as Mandate:

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 84-4169 & 84-4386

STATE OF TEXAS, PETITIONER

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

Petition for Review of Order of the
Interstate Commerce Commission

ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion 09/06/85, 5 Cir., 198—, —— F.2d ——)

(November 15, 1985)

Before GARZA, POLITZ and DAVIS, Circuit Judges

PER CURIAM:

(✓) Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

( ) Treating the suggestions for rehearing en banc as petitions for panel rehearing, the petitions for panel rehearing are DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT .

Nos. 84-4169 &
84-4386

STATE OF TEXAS, PETITIONER

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

On Petition for Review of an Order of
Interstate Commerce Commission

[Filed Nov. 27, 1985]

ORDER:

[ ] The motion of respondents for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

[✓] The motion of respondents for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including January 21, 1986, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above

mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

[ ] The motion of ———————— for a further stay of the issuance of the mandate is GRANTED to and including ————, under the same conditions as set forth in the preceding paragraph.

[ ] The motion of ———————— for a further stay of the issuance of the mandate is DENIED.

/s/ Henry A. Politz
United States Circuit Judge

APPENDIX F

INTERSTATE COMMERCE COMMISSION DECISION

No. 39627

PETITION UNDER 49 U.S.C. 11501(c) BY MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL., FOR REVIEW OF AN ORDER OF THE RAILROAD COMMISSION OF TEXAS

Decided: January 19, 1984

[Service Date Jan. 23, 1984]

By petition filed December 20, 1983, Missouri-Kansas-Texas Railroad Company (MKT), Burlington Northern Railroad Company (BN), Missouri Pacific Railroad Company (MP), and Southern Pacific Transportation Company (SP) ("Texas carriers") seek review of a December 5, 1983, order of the Railroad Commission of Texas (RCT), pursuant to 49 U.S.C. 11501(c). RCT's order exempts from intrastate regulation trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) movements within Texas, but not incidental motor transportation provided by rail carrier as part of a continuous intermodal movement. The Texas carriers contend that RCT's refusal to extend the TOCF/COFC exemption to include rail TOFC/COFC operations conducted in trucks owned and operated by the railroads violates applicable Federal standards. RCT replied.

BACKGROUND

MKT's September 27, 1982, application before RCT (MP, BN and SP intervening) was heard by an examiner who issued a proposal for decision on October 19, 1983. The Texas carriers filed exceptions, but the examiner's findings of fact and conclusions of law were expressly adopted by RCT in its order.

> [T]his proceeding does not involve the exemption of trucking operations performed by the railroads in connection with TOFC/COFC service. The issue before the RCT is whether TOFC/COFC service is to be exempted. TOFC/COFC service is transportation on a *rail car* of freight laden trucks, trailers, semi-trailers, or their container portions, or empty trucks, trailers, semi-trailers, or their container portions when they are moving incidental to prior or subsequent use in TOFC/COFC service.
>
> In its decision in Ex Parte 230, the ICC addressed the exemption of both TOFC/COFC service *and* trucking operations conducted by the railroads in connection with TOFC/COFC service. The instant application filed with the RCT is limited to the exemption of intrastate TOFC/COFC service itself. The public is not on notice that related trucking operation exemptions would be addressed in this proceeding. Furthermore, even if, arguendo, the notice problem were absent, the applicant did not present evidence of the scope of such trucking operations or evidence relating to whether rate regulation is necessary to protect shippers from the abuse of market power relative to any exemption of trucking operations performed by the railroads in connection with TOFC/COFC service.

DISCUSSION

Section 11501(c) provides, as pertinent, that any rail carrier furnishing transportation subject to the jurisdiction of this Commission may petition us to review the decision of any State authority, in any administrative proceeding in which the lawfulness of an intrastate rate, classification, rule, or practice is determined, on the grounds that the standards and procedures applied by the State were not in accordance with the preemptive Fedral provisions. If we determine that the standards and procedures applied by the State were improper, we must then determine the appropriate rate, classification, rule, or practice and authorize the carrier to establish it.

In Ex Parte No. 388, *State Intrastate Rail Rate Authority—P.L. 96-448*, (*Illinois* decision), 367 I.C.C. 149 (1983), the Commission stated that simple application by the States of section 10505 criteria is not sufficient compliance with Federal standards. We essentially concluded that the States in adopting standards and procedures consistent with Federal law must also follow Commission approved exemptions as to rates, rules, classifications, and practices. We concluded that, once a particular category of traffic is exempted by us, it becomes a standard from which states may not deviate, subject to a possible exception relating to unique conditions. Thus, once a Federal exemption is adopted, it applies automatically to intrastate commerce without need for individual State adoption. *See* No. 39355, *Petition Under 49 U.S.C. 11501(c) for Review of an Order of the Public Utilities Commission of Colorado* (not printed), served July 5, 1983, where we authorized the Union Pacific Railroad Company to publish a tariff canceling all rates, charges, rules, and regulations in connection

with the Colorado intrastate movement of agricultural commodities that had been exempted from Federal regulation, and *Iron Sulphate Exemption*, 367 I.C.C. 503, 504 (1983). This principle has been affirmed in other cases. For example, in Ex Parte No. 338 (Sub-No. 25), *Intrastate Rail Rate Authority—Ohio* (not printed), served October 18, 1983, we found unacceptable Ohio's language that it would continue intrastate regulation of Federally exempted traffic:

> Following an exemption decision by the Interstate Commerce Commission, the PUCO may initiate a proceeding, either upon its own motion or upon petition, to evaluate feasible changes in Ohio intrastate regulation which might be consistent with Interstate Commerce Commission regulation.

> This approach is permissible if the proceeding contemplated is instituted only to evaluate and recommend to the ICC possible deviations from Federal exemptions applicable to the state, but the proceeding cannot be a condition precedent to Ohio's initial adoption of Federal exemptions. We will require Ohio to promulgate more specific regulations in this area, including the particular renunciation of its ability to regulate intrastate traffic exempted at the interstate level by this Commission, unless it has obtained *prior* Commission sanction. (Emphasis added).

See also Ex Parte No. 388 (Sub-No. 4), *Intrastate Rail Rate Authority—Florida* (not printed), served March 18, 1983).

The Commission in 1981, pursuant to 49 U.S.C. 10505, exempted rail and motor service provided in connection with TOFC/COFC from regulation under

title 49.[1] *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981), 365 I.C.C. 728 (1982). This exemption was affirmed by the courts in *American Trucking Assoc. Inc.* v. *I.C.C. and U.S.*, 656 F.2d 1115 (5th Cir. 1981). Accordingly, the RCT may not apply less than the complete exemption approved by us without first demonstrating to our satisfaction that unique conditions in Texas render inappropriate the adoption of the complete TOFC/COFC exemption. *Illinois, supra* at 154. The RCT has not made this showing.

It is unfortunate that the Texas carriers and intrastate shippers have been deprived unnecessarily of the full range of benefits available to them under the Federal exemption. Whatever lingering doubts may have existed as to our authority to promulgate regulations binding on the States have been dispelled by the recent decisions in *Wheeling Pittsburgh Steel Corp.* v. *ICC*, —— F.2d —— (3d Cir., Dec. 21, 1983) and *Illinois Central Gulf R.R. Co.* v. *ICC*, 702 F.2d 111 (7th Cir., 1983).

---

[1] See 49 CFR 1039.13 which provides as follows:

> Railroad and truck transportation provided by a rail carrier as part of a continuous intermodal movement is exempt from the provisions of Subtitle IV of Title 49 with certain exceptions. Carriers must continue to comply with Commission accounting and reporting requirements. All railroad tariffs pertaining to the transportation of intermodal freight will no longer apply except to the extent adopted by carrier quotations. Nothing in this exemption shall be construed to affect our jurisdiction under section 10505 or our ability to enforce this decision or any subsequent decision made under authority of this exemption section. This exemption shall remain in effect, unless modified or revoked by a subsequent order of this Commission.

As we have noted in numerous prior decisions concerning intrastate rail contracts, the failure of the RCT to apply Commission standards and the resulting railroad petitions for relief must and will be evaluated in terms of their effect on the pending application in Ex Parte No. 388 (Sub-No. 31), *State Intrastate Rail Rate Authority (Texas)*. That proceeding is one of several involving certification under 49 U.S.C. 11501, which charges the Commission with ensuring that the States will regulate consistently with the Federal scheme. In making certification determinations, we must rely, in some measure, on evidence of a State's good faith as well as its specific rules and regulations. In view of the *Wheeling-Pittsburgh* and the *Illinois Central* decisions, *supra*, any further refusals by the RCT to apply fully the specific commodity exemptions adopted by the Commission will raise very serious questions of RCT's good faith in establishing and following standards and procedures "in accordance with the standards and the procedures applicable to regulation of rail carriers by the Commission under this title." 49 U.S.C. 11501(b)(3)(A).

CONCLUSIONS

Under 49 U.S.C. 11501(c), we find that the RCT's refusal to apply the entire exemption approved by us in *Improvement of TOFC/COFC Regulation*, *supra*, violated Federal standards and procedures binding upon the RCT in its regulation of intrastate commerce. We therefore determine that the entire TOFC/COFC exemption is in effect in the State of Texas, and we authorize the Texas carriers to establish any rate, classification, rule, or practice pertaining to intrastate rail or motor transportation provided by a

rail carrier as part of a continuous intermodal movement within the State of Texas, to the same extent and in the same manner that they establish rates, classifications, rules, or practices for similar interstate movements.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. This decision is effective on the date of service.

2. This proceeding is discontinued.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett and Gradison. Chairman Taylor concurred in the result with a separate expression.

[SEAL]

JAMES H. BAYNE
Acting Secretary

CHAIRMAN TAYLOR, concurring in the result:

I still vehemently disagree with the rationale underlying this decision's pronouncement that "once a Federal exemption is adopted, it applies automatically to intrastate commerce without need for individual State adoption." See my dissents in *State Intrastate Rail Rate Authority—P.L. 96-448*, 367 I.C.C. 149, 154-6 (1983) and Ex Parte No. 388 (Sub-No. 25), *Intrastate Rail Rate Authority—Ohio* (not printed), served October 18, 1983.

However, despite my having opposed the inclusion of I.C.C. exemptions within the obligatory standards that the States are bound to observe, such inclusion has become an administrative fait accompli. Accordingly, this Commission is now statutorily required to see that our standards are enforced.

APPENDIX G

INTERSTATE COMMERCE COMMISSION DECISION

No. 39704

PETITION OF ROAD-RAIL TRANSPORTATION COMPANY, INC., UNDER 49 U.S.C. 11501(c) FOR REVIEW OF AN ORDER OF THE RAILROAD COMMISSION OF TEXAS

Decided: April 11, 1984

[Service Date Apr. 13, 1984]

By petition filed March 13, 1984, under 49 U.S.C. 11501(c), Road-Rail Transportation Company, Inc. (Road-Rail) seeks review of an order of the Railroad Commission of Texas (RCT) denying in part an application for exemption from regulation of service provided in Road-Railer equipment.[1] RCT replied to the petition.

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[1] Road-Railers are semi-trailers designed for use both on highways and on railroads. They are moved between railroad terminals in trains of 20 to 75 units by railroad locomotives and transported over highways for pickups and deliveries. *See* Finance Docket No. 29898, *Road-Rail Transportation Company, Inc.—Petition for Exemption* (not printed), served August 27, 1982 (*Road-Rail*).

RCT denied an exemption for the segments of Road-Rail's service that would be conducted over the highway. It found that, in some instances, the highway movement could be so substantial as to make Road-Rail a motor carrier; that exemption of the proposed service could be injurious to for-hire motor carriage, thereby depriving shippers of a protection from abuse of rail market power; and that an exemption would, for this reason, violate RCT's duty under Texas law "to carefully preserve, foster, and regulate transportation." Tex. Rev. Civ. Stat. Ann., Art. 911b § 4 (d). RCT exempted Road-Rail's over-the-rail service only between Houston and Ft.Worth-Dallas, stating that its public notice concerning the application identified operations only between these points.

On petition, Road-Rail contends that RCT's decision violates applicable Federal standards by failing to grant a full exemption for Road-Rail service based on the exemption for intermodel service granted by us in *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981) (TOFC/COFC). In footnote 1 of that decision we stated, "we intend the exemption to extend to 'Roadrailer' equipment and any other equipment developed to be used in intermodal service." RCT replies that it is not bound by the exemptions we grant under 49 U.S.C. 10505 unless it decides independently to extend those exemptions to Texas intrastate commerce. It argues it has been given inadequate notice and opportunity to be heard concerning the application of our exemptions to Texas.

DISCUSSION AND CONCLUSIONS

Section 11501(c) provides, as pertinent, that any rail carrier furnishing transportation subject to the jurisdiction of this Commission may petition us to

review the decision of any State authority, in any administrative proceeding in which the lawfulness of an intrastate rate, classification, rule, or practice is determined, on the grounds that the standards and procedures applied by the State were not in accordance with the preemptive Federal provisions. If we determine that the standards and procedures applied by the State were improper, we must then determine the appropriate rate, classification, rule, or practice and authorize the carrier to establish it.

In *State Intrastate Rail Rate Authority—P.L. 96-488*, 367 I.C.C. 149 (1983) (*Illinois II*),[2] the Commission in considering Illinois' certification request, stated that simple application by the States of section 10505 criteria is not sufficient compliance with Federal standards. We essentially concluded that the States, in adopting standards and procedures consistent with Federal law, must also follow Commission-approved exemptions as to rates, rules, classifications, and practices. Once a particular category of traffic is exempted by us, it becomes a standard from which States may not deviate, subject to a possible exception relating to unique conditions. Thus, once a Federal exemption is adopted, it applies automatically to intrastate commerce without need for individual State adoption. We have reaffirmed and applied this principle in a number of subsequent decisions.[3]

---

[2] The *Illinois II* decision was issued after comments were received pursuant to our decision in *State Intrastate Authority-P.L. 96-488*, 365 I.C.C. 855 (1982) (*Illinois I*).

[3] *See, e.g.*, No. 39667, *Petition of Missouri Pacific Railroad Company under 49 U.S.C. 11501(c) for Review of Three Orders of the Rail Rate Board of the Railroad Commission of Texas* (not printed), served March 9, 1984, and decisions cited therein.

RCT contends that we lack authority to extend our exemptions to intrastate commerce because the RCT was not accorded a fair hearing. Texas received sufficient notice of the relevance of other State proceedings to its own. We stated that the *Illinois I* decision could be useful to other States and thus extended the deadline for other States submitting their standards and procedures. In *Illinois II*, we clearly indicated that the policy established there was binding on the "States," not just on Illinois. 367 I.C.C. at 152. We again gave the States time to supplement their filings in accordance with the principles stated there. Copies of those decisions were served on Texas. Thus, it was plain that the *Illinois* analysis was case law precedent that was to be followed by all the other States seeking certification. Moreover, notices of all our major rulemakings, including the TOFC/COFC exemption, were published in the *Federal Register*. Comments were requested, and Texas was free to partcipate in these proceedings.

We specifically found in the Road-Rail case, *supra* (see fn. 1), that Road-Rail is a rail carrier subject to our jurisdiction, that its rail *and* highway operations constitute intermodal service provided by a rail carrier, and that such operations are "covered by the exemption already granted" in the *TOFC/COFC* proceeding. In a decision served January 23, 1984,[4] we determined that the entire TOFC/COFC exemption is in effect in the State of Texas and we authorized four railroads to establish their rates and practices accordingly. Thus, the failure of RCT to recognize

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[4] No. 39627, *Petition under 49 U.S.C. 11501(c) by Missouri-Kansas-Texas Railroad Company, et al., for Review of an Order of the Railroad Commission of Texas* (not printed), served January 23, 1984.

an exemption for all of Road-Rail's intermodal rail and highway operations within Texas is a clear violation of Federal standards.

It is unfortunate that the Texas carriers and intrastate shippers have been deprived unnecessarily of the full range of benefits available to them under the Federal exemption. Whatever lingering doubts may have existed as to our authority to promulgate regulations binding on the State should have been dispelled by the recent decisions in *Wheeling Pittsburgh Steel Corp.* v. *ICC*, 723 F.2d 346 (3d Cir. 1983) and *Illinois Central Gulf R.R. Co.* v. *ICC*, 702 F.2d 111 (7th Cir. 1983).

As we have noted in numerous prior decisions concerning intrastate rail contracts, the failure of RCT to apply Commission standards and the resulting railroad petitions for relief must and will be evaluated in terms of their effect on the pending application in Ex Parte No. 388 (Sub-No. 31), *State Intrastate Rail Rate Authority (Texas)*. This proceeding is one of several involving certification under 49 U.S.C. 11501, which charges the Commission with ensuring that the States will regulate consistently with the Federal scheme.

Under 49 U.S.C. 11501(c), we find that the RCT's refusal to accord Road-Rail the benefits of the entire exemption approved by us in TOFC/COFC violated Federal standards and procedures binding upon RCT in its regulation of intrastate commerce. As noted above, we have previously determined in No. 39627, *supra*, that the entire TOFC/COFC exemption is in effect in the State of Texas and in *Road-Rail*, *supra*, that the service at issue here is covered by that exemption. Consequently, we authorize Road-Rail to establish any rate, classification, rule, or practice pertain-

ing to intrastate rail or motor transportation that Road-Rail provides as a rail carrier as part of a continuous intermodal movement within the State of Texas, to the same extent and in the same manner that it establishes rates, classifications, rules or practices for similar interstate movements.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. This decision is effective on the date of service.

2. This proceeding is discontinued.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett and Gradison. Commissioner Gradison did not participate.

[SEAL]

JAMES H. BAYNE
Acting Secretary

APPENDIX H

STATUTES INVOLVED

Section 11501, Title 49, United States Code, provides that:

> § 11501. Interstate Commerce Commission authority over intrastate transportation
>
> (a) The Interstate Commerce Commission shall prescribe the rate, classification, rule or practice for transportation or service provided by a carrier subject to the jurisdiction of the Commission under subchapter IV of chapter 105 of this title when the Commission finds that a rate, classification, rule, or practice of a State causes—
>
> (1) between persons or localities in intrastate commerce and in interstate and foreign commerce, unreasonable discrimination against those persons or localities in interstate or foreign commerce; or
>
> (2) unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce.
>
> (b)(1) A State authority may only exercise jurisdiction over intrastate transportation provided by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title if such State authority exercises such jurisdiction exclusively in accordance with the provisions of this subtitle.
>
> (2) Within 120 days after the effective date of the Staggers Rail Act of 1980, each State authority exercising jurisdiction over intrastate

rates, classifications, rules, and practices for intrastate transportation described in paragraph (1) of this subsection shall submit to the Commission the standards and procedures (including timing requirements) used by such State authority in exercising such jurisdiction.

(3)(A) Within 90 days after the receipt of the intrastate regulatory rate standards and procedures of a State authority under paragraph (2) of this subsection, the Commission shall certify such State authority for purposes of this subsection if the Commission determines that such standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission under this title. If the Commission determines that such standards and procedures are not in such accordance, it shall deny certification to such State authority, and such State authority may resubmit new standards and procedures to the Commission for review in accordance with this subsection.

(B) The standards and procedures existing in each State on the effective date of the Staggers Rail Act of 1980 for the exercise of jurisdiction over intrastate rail rates, classifications, rules, and practices shall be deemed to be certified by the Commission from that date until the date an initial determination is made by the Commission under subparagraph (A) of this paragraph.

(4)(A) Any State authority which is certified by the Commission under this subsection may use its standards and procedures in exercising jurisdiction over intrastate rail rates, classifications, rules, and practices during the 5-year period

commencing on the date of such certification. Any State authority which is denied certification or which does not seek certification may not exercise any jurisdiction over intrastate rates, classifications, rules, and practices until it receives certification under this subsection.

(B) Any intrastate transportation provided by a rail carrier in a State which may not exercise jurisdiction over an intrastate rate, classification, rule, or practice of that carrier due to a denial of certification under this subsection shall be deemed to be transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(5)(A) Certification of State authority under this subsection is valid for the 5-year period beginning on the date of such certification. Prior to the expiration of such 5-year period, the State authority shall resubmit its intrastate regulatory standards procedures to the Commission for subsequent certification in accordance with this subsection.

(B) During any 5-year certification period, a State may not change its certified standards and procedures without notifying and receiving express approval from the Commission.

(6) Notwithstanding any other provision of this subtitle, a State authority may not exercise any jurisdiction over general rate increases under section 10706 of this title, inflation-based rate increases under section 10712 of this title, or fuel adjustment surcharges approved by the Commission.

(c) Any rail carrier providing transportation subject to the jurisdiction of the Commission un-

der subchapter I of chapter 105 of this title may petition the Commission to review the decision of any State authority in any administrative proceeding in which the lawfulness of an intrastate rate, classification, rule, or practice is determined on the grounds that the standards and procedures applied by the State were not in accordance with the provisions of this subtitle. The Commission shall take final action on any such petition within 30 days after the date it is received. If the Commission determines that the standards and procedures were not in accordance with the provisions of this subtitle, its order shall determine and authorize the carrier to establish the appropriate rate, classification, rule, or practice.

(d)(1) The Commission has exclusive authority to prescribe an intrastate rate for transportation provided by a rail carrier subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title when—

(A) a rail carrier files with an appropriate State authority a change in an intrastate rate, or a change in a classification, rule, or practice that has the effect of changing an intrastate rate, that adjusts the rate to the rate charged on similar traffic moving in interstate or foreign commerce; and

(B) the State authority does not act finally on the change by the 120th day after it was filed.

(2) When a rail carrier files an application with the Commission under this subsection, the Commission shall prescribe the intrastate rate

under the standards of subsection (a) of this section and chapter 107 of this title. Notice of the application shall be served on the State authority.

(e)(1) The Commission shall prescribe any rate, rule, or practice applicable to transportation provided entirely in one State by a motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title—

> (A) if the carrier has requested the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice and the request has been denied (in whole or in part) or the State authority has not acted finally (in whole or in part) on the request by the 120th day after the carrier made the request; and
>
> (B) if the Commission finds that the rate, rule, or practice in effect and applicable to such intrastate transportation causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce.

(2) For purposes of paragraph (1)(B) of this subsection, there shall be a rebuttable presumption that—

> (A) any rate, rule, or practice applicable to transportation provided by a motor common carrier of passengers entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds—

(i) that such rate, rule, or practice results in the carrier charging a rate for such transportation which is lower than the rate such carrier charges for comparable interstate transportation of passengers;

(ii) on the basis of evidence presented by the carrier, that as a result of such rate, rule, or practice such carrier does not receive revenues from such transportation which exceed the variable costs of providing such transportation; or

(iii) that the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice failed to act finally (in whole or in part) on the request of the carrier to establish such rate, rule, or practice by the 120th day after the date the carrier made the request; and

(B) any rate applicable to transportation entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds that the most recent general rate increase applicable to transportation provided by motor common carriers of passengers in such State is less than the most recent general rate increase applicable to interstate transportation provided by motor common carriers of passengers under this subtitle.

(3) (A) A motor common carrier of passengers must file an application with the Commission for

prescription under this subsection of a rate, rule, or practice applicable to transportation provided entirely in one State by such carrier. When such application is filed with the Commission, the carrier shall certify that he has notified (i) the Governor of such State, (ii) the department, agency, or instrumentality of such State which denied, or failed to take action on the request of such carrier related to such rate, rule, or practice, and (iii) such other interested persons as the Commission may specify by regulation. The Commission shall take final action on any such application not later than 60 days after such application is filed with the Commission.

(B) The Commission shall establish, by regulation, procedures for processing applications under this subsection.

(4) This subsection shall not apply to any carrier owned or controlled by a State or local government.

(5) No State or political subdivision thereof and no interstate agency of other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provisions having the force and effect of law relating to scheduling of interstate or intrastate transportation provided by motor common carrier of passengers subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title on an authorized interstate route or relating to the implementation of any reduction in the rates for such transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required. This paragraph shall not apply to intrastate commuter bus operations.

(6)(A) No motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission may charge or collect a rate for intrastate service provided on an authorized interstate route which constitutes a predatory practice in contravention of the transportation policy set forth in section 10101(a) of this title.

(B) When the Commission decides, upon complaint by any person, that a reduction in a rate charged or collected by such a motor common carrier of passengers for intrastate service provided on an authorized interstate route constitutes a predatory practice in contravention of the transportation policy set forth in section 10101(a) of this title, the Commission shall prescribe the rate applicable to such service.

(f) The Commission may take action (1) under this section only after a full hearing, or (2) with respect to a rate, rule, or practice of a motor common carrier of passengers, in accordance with the procedures established by the Commission under subsection (e)(3)(B) of this section. Action of the Commission under this section supersedes State law or action taken under State law in conflict with the action of the Commission.

Section 10505, Title 49, United States Code, provides that:

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that

is provided by a rail carrier as a part of a continuous intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

Section 10501, Title 49, United States Code, provides that:

§ 10501. General jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation—

(1) by rail carrier, express carrier, sleeping car carrier, water common carrier, and pipeline carrier that is—

(A) only by railroad;

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment; or

(C) by pipeline or by pipeline and railroad or water when transporting a commodity other than water, gas, or oil; and

(2) to the extent such jurisdiction is not limited by subsection (b) of this section or the extent the transportation is in the United States and is between a place in—

(A) a State and a place in another State;

(B) the District of Columbia and another place in the District of Columbia;

(C) a State and a place in a territory or possession of the United States;

(D) a territory or possession of the United States and a place in another such territory or possession;

(E) a territory or possession of the United States and another place in the same territory or possession;

(F) the United States and another place in the United States through a foreign country; or

(G) the United States and a place in a foreign country.

(b) The Commission does not have jurisdiction under subsection (a) of this section over—

(1) the transportation of passengers or property, or the receipt, delivery, storage, or handling of property, entirely in a State (other than the District of Columbia) and not transported between a place in the United States and a place in a foreign country except as otherwise provided in this subtitle; or

(2) transportation by a water common carrier when that transportation would be subject to this subchapter only because the water common carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, a switching, terminal, lighterage, car rental, trackage, handling, or other charge by a rail carrier for services in

the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(c) This subtitle does not affect the power of a State, in exercising its police power, to require reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission under this subchapter unless (1) the transportation is deemed to be subject to the jurisdiction of the Commission pursuant to section 11501(b)(4)(B) of this title, or (2) the State requirement is inconsistent with an order of the Commission issued under this subtitle or is prohibited under this subtitle.

(d) The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title) over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive.

Section 10101a, Title 49, United States Code, provides that:

§ 10101a. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious

regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

Section 10521, Title 49, United States Code, provides that:

§ 10521. General jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by motor carrier and the procurement of that transportation to the extent that passengers, property, or both, are transported by motor carrier—

(1) between a place in—

(A) A State and a place in another State;

(B) a State and another place in the same State through another State;

(C) the United States and a place in a territory or possession of the United

States to the extent the transportation is in the United States;

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

(b) This subtitle does not—

(1) except as provided in sections 10922 (c)(2), 10935, and 11501(e) of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier;

(2) except as provided in sections 10922 (c)(2) and 11501(e), authorize the Commission to prescribe or regulate a rate for intrastate transportation provided by a motor carrier;

(3) except as provided in section 10922 (c)(2) of this title, allow a motor carrier to provide intrastate transportation on the highways of a State; or

(4) except as provided in section 11503a and section 11504(b) of this title, affect the taxation power of a State over a motor carrier.

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NO. 85-1222 and NO. 85-1267

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION,
Petitioner,

V.

STATE OF TEXAS,
Respondent.

AND

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioners,

V.

STATE OF TEXAS
Respondent.

BRIEF OF THE STATE OF TEXAS IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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NO. 85-1222 and NO. 85-1267

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION,
Petitioner,

V.

STATE OF TEXAS,
Respondent.

AND

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioners,

V.

STATE OF TEXAS,
Respondent.

BRIEF OF THE STATE OF TEXAS IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

The Attorney General of Texas, on behalf of the State of Texas, files this Brief in Opposition to the Petitions for Writ of Certiorari of the Interstate Commerce Commission ("I.C.C."). and Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, and Southern Pacific Transportation Company (collectively "the Railroads").

STATEMENT

The State of Texas sought a review of orders from the I.C.C. issued under 49 U.S.C. §10505. The order exempted intrastate

intermodal transportation of trailer on flat car and container on flat car (collectively TOFC/COFC) traffic from state and federal regulation. The Fifth Circuit Court of Appeals properly determined that the I.C.C. had exceeded its jurisdiction and could not preempt state regulation of purely intrastate motor carrier transportation.

REASONS FOR DENIAL OF THE PETITION

The I.C.C. lacks jurisdiction over purely intrastate motor carrier traffic. Given no jurisdiction, the I.C.C. has no power to exempt intrastate motor carrier transportation from state regulation.

The general jurisdiction of the I.C.C. over rail transportation is outlined in 49 U.S.C. §10501. The statute expressly qualifies the jurisdiction of the I.C.C. on two factors. First, Section 10501(a)(1)(A) gives the "Commission jurisdiction over transportation (1) by rail carrier ... that is (A) only by railroad." Secondly, Section 10501(a)(1)(B) makes it clear that jurisdiction extends only to interstate transportation.

Specific reference to the jurisdiction of the I.C.C. over motor carrier transportation, 49 U.S.C. §10521, expressly dictates that I.C.C. jurisdiction involves interstate traffic and does not "affect the power of the state to regulate intrastate transportation provided by motor carrier".

1. No Conflict Between Circuits Exists.

The decision in *Illinois Commerce Commission v. I.C.C.*, 749 F.2d 875 (D.C. Cir. 1984) is not in conflict with the case at bar as asserted by the Railroads and the I.C.C. In *Illinois*, the court held that the I.C.C.'s exemptions pursuant to the Staggers Act were standards applicable to the states. The *Illinois* court did *not* hold that the I.C.C.'s exemption power extends to matters over which the I.C.C. has no jurisdiction. Specifically, the *Illinois* court did not hold that the I.C.C. could exempt intrastate motor carriage in connection with intrastate, intermodal TOFC/COFC transportation.

In the present case, the Fifth Circuit does not address the "exemption v. standard" dispute upon which the District of Columbia Circuit held. Resolution of those issues is not necessary to the Fifth Circuit's conclusion. The Fifth Circuit, properly, ruled upon the purely jurisdictional question. Given the heated controversy on the exemption/standard dispute in the District of Columbia Circuit (*See, Illinois,* dissenting opinion, 749 F.2d at pp. 887-893), it should not be assumed, as Petitioners apparently assert, that the Fifth Circuit ruled on this issue in passing.

The Fifth Circuit appropriately distinguished *American Trucking Ass'ns v. Interstate Commerce Commission,* 656 F.2d 1115 (5th Cir. 1981). That case involved interstate rail carrier traffic and interstate motor carrier traffic. The I.C.C. has clear jurisdiction over interstate rail carrier and interstate motor carrier traffic. The Fifth Circuit, in this case, recognized, however, that given a situation involving intrastate motor carrier transportation, in conjunction with intrastate rail transportation, the I.C.C. has no jurisdiction over the intrastate motor carriage.

In reaching its decision in the case at bar the Fifth Circuit evaluated the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31, and the Staggers Rail Act and concluded that there is no clear intent, by Congress, to prohibit the states from regulating motor carriers that operate totally intrastate. On the contrary, amendments to 49 U.S.C. §10521(b)(1), as recently as 1982, establish exceptions to the power of the states over intrastate motor carrier transportation. Of these exceptions, none involve intrastate trucking in connection with intrastate rail transportation. As stated by the Fifth Circuit, "If Congress had intended to change the power of the states to regulate that activity, it could, and presumptively would, have added a fourth exception to the power of the states to regulate intrastate transportation by motor carrier." The State of Texas asserts that there is not conflict between Circuits which requires a determination by this Court.

2. No Conflict With This Court's Decisions Exists.

In addition, the Fifth Circuit's opinion here is not in conflict with decisions of this Court as contended by the I.C.C. In neither *Thomson v. United States*, 321 U.S. 19 (1944), nor *American Trucking Ass'ns v. A.T. & S.F. Ry. Co.*, 387 U.S. 397 (1967) did this Court hold that the I.C.C. could act outside its statutory jurisdiction to exempt intrastate motor carrier traffic. The I.C.C.'s assertion that this Court held in *Thomson* that "a railroad may use trucks as part of a 'single complete freight transportation service to and from all points on its lines' without becoming a motor common carrier within the meaning of the Interstate Commerce Act," (I.C.C. Petition, p. 13) is simply incorrect. In *Thomson*, this Court stated:

> Even more clearly, under the amended definition, the railroad is holding itself out to the general public to engage in the transportation of freight by motor vehicle as part of its coordinated rail-motor freight service. *In short, it is a common carrier by motor vehicle within the meaning of the Act.* 321 U.S. at p. 25. [Emphasis added].

The Court went on to hold the railroad "... entitled to common carrier 'grandfather' rights as to the motor vehicle service ..." *Id.*

3. The RCT's Certification is Immaterial.

That the Railroad Commission of Texas ("RCT") is not certified to regulate rail traffic, pursuant to 49 U.S.C. 11501, is of no consequence to the result reached by the Fifth Circuit in this case. The RCT, in this proceeding, has never asserted jurisdiction over the rail portion of the TOFC/COFC movements. The Fifth Circuit's opinion does not empower the RCT to make such an assertion. It is the intrastate motor carriage which the State seeks to continue regulating and over which the I.C.C. has no statutory authority.

CONCLUSION

The State of Texas prays that the Petition for Writ of Certiorari be denied.

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No. 85-1222

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS, RESPONDENT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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In the Supreme Court of the United States

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No. 85-1222

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS, RESPONDENT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

1. Respondent makes no attempt to defend the practical result produced by the court of appeals' decision—the creation of two separate regulatory regimes (one exempt, one non-exempt) as to otherwise identical TOFC/COFC movements performed by interstate rail carriers where one terminates inside Texas and the other does not. This is precisely the evil—dual regulatory standards for identical railroad-provided services—that Congress intended to eradicate through the expressly pre-emptive scheme of the Staggers Act. (See Pet. 16-19.) Since our petition was filed, this Court overturned a state regulation inimical to a federal deregulatory scheme because "Congress, in revising a comprehensive regulatory scheme to give market forces a more significant role" did not "intend to give the States the power it had denied" the federal agency. *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, ____ U.S. ____, 106 S. Ct. 709, 717 (1986). In the present case, the specific deregulatory action (the TOFC/COFC exemption) is an administrative initiative taken in furtherance of statutory command. But the ICC's mandate "to assure that intrastate regulatory jurisdiction is exercised in accordance with the [federal] standards," 49 U.S.C. 10101a(a)(9), is, we submit, far clearer and less

ambiguous[1] than the pre-emptive intent found by this Court in the recent natural gas legislation at issue in *Transcontinental.* The directive that the ICC and certified states shall exercise "exclusive" jurisdiction over transportation provided by rail carriers, using uniform federal standards and procedures, 49 U.S.C. 10501(d), 11501(b), requires no inferences as to congressional intent.(See Pet. 7-9.) Apparently recognizing this, respondent does not even attempt to reconcile the decision below with the pre-emption embodied in the Staggers Act, but instead seeks refuge (Br. 3) in the mere absence of amendments to the "motor carrier" provisions of the Interstate Commerce Act.

2. The central issue is whether the court of appeals erred—and placed itself in conflict with the pre-emptive scheme of the Staggers Act and decisions of other courts—by redefining the portion of a continuous intrastate TOFC/COFC intermodal movement that is performed in a *railroad-owned* truck as "motor carriage," thus subjecting that part of the railroad's through service to plenary state regulatory jurisdiction, unfettered by the expressly pre-emptive uniform standards of the Staggers Act. Respondent follows in the path of the court of appeals by begging this fundamental question: it offers only *ipse dixits* that the service is "intrastate motor carriage" (Br. 2,4) and "intrastate motor traffic" (Br. 3,4).[2]

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[1] See *Transcontinental, supra*, 106 S. Ct. at 722 (Rehnquist, Powell, Stevens, and O'Connor, JJ., dissenting) (state regulation that interferes with federal price deregulation distinguished from rules defining property or contractual rights).

[2] Respondent quibbles (Br. 4) over the relevance of this Court's *Thomson* decision (Pet. 13), asserting that *Thomson* shows railroad-owned trucking to be *ipso facto* "motor carriage." In fact, as we earlier stated, *Thomson* recognized that there is no automatic equivalence between the two. The particular service in *Thomson* involved separate "motor vehicle operators" acting as "independent con-

Respondent makes no mention of either Section 10501(d) or the pre-emptive language of Section 11501 (compare Pet. 7-9). Respondent even asserts (Br. 4) that the uncertified status of the Railroad Commission of Texas is "immaterial" because the transportation is "motor carriage." This entirely overlooks the existence of a pre-emptive provision expressly addressed to uncertified states: "[a]ny *intrastate transportation provided by a rail carrier* . . . shall be deemed to be transportation subject to the jurisdiction of the Commission under [Sections 10501 *et seq.*]" 49 U.S.C. 11501(b)(4)(B) (emphasis added). See Pet. 8-9.

3. Respondent never mentions the crucial statutory language, "transportation provided by a rail carrier," previously held to include the portion of TOFC/COFC movements performed in railroad-owned trucks. The Fifth Circuit's *ATA II* decision, for example, is spuriously distinguished as dealing with "motor carrier traffic" (Br. 3) when the holding there (656 F.2d at 1120) plainly rested on the "provided by a rail carrier" language. (See Pet. 15.) Respondent makes no attempt whatever to distinguish the later *Hansen* decision on the same point (Pet. 16) in the Seventh Circuit.

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tractors" (321 U.S. at 24,25) who were found not to be necessarily entitled to motor-carrier "grandfather" rights when engaged in connecting service with the railroad. *Id.* at 25-26. This does not diminish the applicability of the general principle that no inherent equivalence exists between "motor carriage" and a through movement traveling partially in a railroad-controlled truck.

In apparent recognition of this reality, respondent makes no attempt to impugn this Court's subsequent decision upholding ICC jurisdiction over intermodal activities by railroads in *ATA I* (Pet. 13). Inded, *ATA I* deplored "statutory compartmentalization" of intermodal service, such as respondent attempts here. 387 U.S. at 420 n. 10.

CONCLUSION

For these reasons and those stated in our petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Nos. 85-1222 and 85-1267

In the Supreme Court of the United States

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v.

STATE OF TEXAS, ET AL.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL., PETITIONERS

v.

STATE OF TEXAS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

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v.

STATE OF TEXAS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners contend that the court of appeals erred in holding that the Interstate Commerce Commission (ICC) lacks jurisdiction to exempt from state regulation the motor portion of intrastate trailer-on-flatcar (TOFC) transportation provided by interstate railroads.

1. The Staggers Rail Act of 1980 (Staggers Act), Pub. L. No. 96-448, 94 Stat. 1895 *et seq.*, amended the Interstate Commerce Act to preempt state regulation of interstate railroads, even with respect to

shipments that originate and terminate within one state. The Act provided a mechanism, 49 U.S.C. 11501 (b), whereby states wishing to continue to exercise jurisdiction over intrastate transportation provided by a rail carrier could apply to the Commission for "certification" to exercise jurisdiction in accordance with federal standards. Specifically, 49 U.S.C. 11501(b)(2) provides that a state authority may sumbit its regulatory standards and procedures to the Commission, and 49 U.S.C. 11501(b)(3)(A) provides that the Commission shall certify such state authority if the Commission determines that the state standards and procedures are "in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission." If a certified state rejects a proposed intrastate rate or practice of an interstate railroad, the railroad may petition the ICC to reverse the state's decision for failing to follow federal standards. 49 U.S.C. 11501(c). In any state whose authority has not been certified by the Commission, "[a]ny intrastate transportation provided by a[n interstate] rail carrier * * * shall be deemed to be transportation subject to the jurisdiction of the Commission * * *." 49 U.S.C. 11501(b)(4)(B).

2. In 1981, pursuant to its authority to exempt from regulation any service provided by "a rail carrier providing transportation subject to the jurisdiction of [the Commission]," 49 U.S.C. 10505(a), the ICC exempted TOFC traffic from all regulation.[1] The

[1] When goods are to be delivered from or to a place not accessible by rail, TOFC eliminates the need to transfer the goods between rail car and truck. The goods are loaded into a truck trailer that is carried on a flatcar for the rail portion of the journey. See generally *American Trucking Ass'ns* v. *A.T. & S.F. Ry.*, 387 U.S. 397 (1967).

exemption applies to both the rail portion and the motor portion of the movement as long as the truck service is provided by a railroad in its own trucks as part of a continuous intermodal movement. Congress specifically provided in the Staggers Act that "[t]he Commission may exercise its [exemption] authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement," 49 U.S.C. 10505(f), and the Commission concluded that railroad-provided TOFC motor service is "transportation that is provided by a rail carrier" within the meaning of this provision. See *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 391, 396 (1980), aff'd, 364 I.C.C. 731 (1981).

The Fifth Circuit appeared to uphold the Commission's exemption of TOFC traffic in all relevant respects in *American Trucking Ass'ns* v. *ICC (ATA)*, 656 F.2d 1115 (5th Cir. 1981). Petitioners in *ATA* had argued that the TOFC exemption exceeded the Commission's authority because the statute prohibits it from exempting motor carriers from the Act's requirements (with exceptions not relevant here). 49 U.S.C. 10521(b)(1). The court of appeals rejected this challenge (656 F.2d at 1120 (footnote omitted)):

> [R]ail-owned truck TOFC/COFC service is "transportation that is provided by a rail carrier." Had Congress intended to limit the Commission's exemption authority to rail transportation, it could easily have done so by using that language. Instead, it chose the broad "transportation-that-is-provided-by-a-rail-carrier" language and presumably did so with knowledge that it previously had defined "transportation" to include the movement of passengers or property by motor vehicle. 49 U.S.C. § 10102(24).

3. Following the Commission's promulgation of the TOFC exemption, the petitioner railroads filed a petition with the Railroad Commission of Texas (RCT) requesting that the exemption be applied to Texas intrastate traffic. After a hearing, RCT exempted the rail portion of intrastate TOFC movements but declined to apply the exemption to the motor portion even though provided by an interstate railroad. The petitioner railroads thereafter appealed to the ICC. The ICC ordered implementation of the exemption with respect to the entire movement, explaining that ICC exemptions are "federal standards" that are binding on the states.

4. Texas sought review of the ICC orders in the Fifth Circuit. While that petition was pending, the ICC denied Texas' application for permanent certification to regulate intrastate rail rates.[2] Under the statute, this denial rendered "[a]ny intrastate transportation provided by a rail carrier in [Texas] * * * subject to the jurisdiction of the Commission." 49 U.S.C. 11501(b)(4)(B). The government therefore argued to the court of appeals that Texas' petition for review was moot. The court of appeals disagreed and reversed the Commission. The court distinguished between "intrastate rail traffic," over which the ICC concededly has jurisdiction, and "intrastate trucking connected with intrastate rail travel" (Pet. App. 6a). The court held that the Commission lacks jurisdiction

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[2] *Ex parte No. 388 (Sub. No. 31) State Intrastate Rail Rate Authority—Texas*, 1 I.C.C.2d 26 (1984), aff'd *sub nom. Railroad Commission of Texas* v. *United States*, 765 F.2d 221 (D.C. Cir. 1985). Prior to the ICC's decision denying certification in May 1984, Texas had received "provisional" certification. It was pursuant to that provisional certification that RCT issued the decision at issue here.

to regulate intrastate motor carriage and therefore that it may not require Texas to apply the TOFC exemption to the motor portion of intrastate TOFC movements provided by interstate railroads. The court of appeals subsequently denied a petition for rehearing en banc.

5. We agree with petitioners that the court of appeals clearly erred in holding that the ICC lacks jurisdiction to exempt intrastate TOFC traffic in its entirety from regulation. The Staggers Act was designed to free interstate railroads from the constraints of state regulation even with respect to intrastate shipments. See *Illinois Commerce Commission* v. *ICC*, 749 F.2d 875, 886 (D.C. Cir. 1984), cert. denied, No. 84-1829 (Oct. 7, 1985). Indeed, the court of appeals in this case recognized that "[a] principal change occasioned by the Staggers Rail Act was the curtailment of the authority of the states to regulate [intrastate rail] traffic" (Pet. App. 6a). And the court acknowledged that the Commission "has authority 'to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement' " (*ibid.*, quoting 49 U.S.C. 10505(f)). The court's decision therefore rests on its conclusion that the truck portion of intrastate TOFC traffic provided by a railroad is not "transportation that is provided by a rail carrier as a part of a continuous intermodal movement," but instead is "intrastate transportation provided by a motor carrier," which remains subject to state regulation under 49 U.S.C. 10521(b)(1). See Pet. App. 6a-7a.

This conclusion does not withstand analysis. First, it is at odds with the language of the statute. Petitioners are interstate rail carriers, not motor carriers, and therefore the TOFC service they provide is

transportation "provided by a rail carrier," not transportation "provided by a motor carrier." The Commission has specifically ruled that the truck portion of TOFC service is transportation provided by a rail carrier within the meaning of 49 U.S.C. 10505(f), and the Fifth Circuit has affirmed and expressly approved that ruling. *American Trucking Ass'ns* v. *ICC*, *supra*. As the Fifth Circuit reasoned in *ATA*, if Congress had intended to limit its preemption of state regulation solely to rail traffic, it could "easily" have done so explicitly instead of using the broader phrase "transportation provided by a rail carrier." See 656 F.2d at 1120. Since the Fifth Circuit had held in *ATA* that this phrase generally encompasses the truck portion of TOFC traffic, it was illogical for it to hold that "transportation provided by a rail carrier" ceases to include the truck portion of TOFC traffic when the shipment originates and terminates within a single state. The court of appeals provided no explanation for this evident inconsistency.[3]

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[3] The court's statement (Pet. App. 6a) that it would "court potential mischief" to accept the Commission's interpretation because it would allow a "small intrastate railroad" to operate intrastate TOFC traffic that consisted almost exclusively of truck traffic is difficult to understand. Intrastate rail carriers are not within the ICC's jurisdiction at all. See 49 U.S.C. 10501(b)(1); *Magner-O'Hara Scenic Ry.* v. *ICC*, 692 F.2d 441, 444 (6th Cir. 1982). This case involves major interstate railroads, and, in that setting, the Commission's interpretation plainly furthers the policies of the Staggers Act. Under the decision of the court of appeals, two nearly identical TOFC shipments carried on the *same train* will be subject to wholly disparate regulatory schemes because one shipment crosses a state line and one does not. See 85-1267 Pet. 7-8. Thus, the court of appeals' decision reintroduces the very problem of state regulation interfering with interstate rail traffic that the Staggers Act sought to eradicate. See 85-1222 Pet. 11-12.

The court of appeals' decision is also at odds with the rationale of decisions in other circuits. In *Illinois Commerce Commission* v. *ICC*, *supra*, the District of Columbia Circuit held that a state regulating intrastate traffic under certification by the Interstate Commerce Commission is required to apply the same exemptions adopted by the ICC. Given the ICC's recognized authority under 49 U.S.C. 10505(f) to exempt TOFC traffic in its entirety, the District of Columbia Circuit's decision is difficult to square with the conclusion of the court of appeals in this case that the ICC lacks jurisdiction to regulate a portion of intrastate TOFC traffic. See 85-1222 Pet. 17-18; 85-1267 Pet. 4-6. In addition, the Seventh Circuit in *Hansen* v. *Norfolk & Western Ry.*, 689 F.2d 707, 712 (1982), has noted with approval the ICC's ruling that the truck portion of railroad-provided TOFC service is transportation "provided by a rail carrier" within the meaning of 49 U.S.C. 10505(f). However, because no other court of appeals has faced the precise question presented here—whether the truck portion of intrastate TOFC traffic is outside the ICC's jurisdiction—it is arguable that there is not yet a direct conflict in the circuits on this issue.

We are not in a position to assess the practical impact of the court of appeals' erroneous decision. The ICC advises us that the total amount of intrastate TOFC transportation provided by rail carriers is not large at this time but that there is a significant possibility of growth. Given the lack of a direct conflict, the Court could conclude that review would be premature. On the other hand, we believe the court of appeals was clearly wrong, and there is little prospect that its decision will be uniformly adopted by other courts of appeals. The decision therefore in-

jects substantial confusion into the interpretation and administration of the Staggers Act. Moreover, allowing the court of appeals' misreading of the Staggers Act to stand may constrict the future development of one potentially important form of transportation service.[4] On balance, because the court of appeals has clearly erred and because its decision directly hinders the achievement of one of the principal goals of the Staggers Act, we believe that it is appropriate for the Court to grant certiorari.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

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[4] Because of the size of the state of Texas, questions concerning the regulation of intrastate commerce assume more practical importance in the Fifth Circuit than in most other circuits.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1222

INTERSTATE COMMERCE COMMISSION, PETITIONER

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 84-4386, U.S.C.A., 5th Cir.	4
Application of Missouri-Kansas-Texas R.R. Co. for Exemption from Regulation, Sept. 27, 1982 (Exhibit 2 to Missouri-Kansas-Texas R.R. Co. Petition to the Interstate Commerce Commission under 49 U.S.C. 11501(c), Dec. 19, 1983)	7

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* The relevant opinions of the court of appeals and the Interstate Commerce Commission are printed in the appendix to the petition for a writ of certiorari in No. 85-1222 and have not been reproduced.

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503 MG-1112

SUBJECT																		CROSS APPEAL NO.	CASE NUMBER
	PRIS A	PRIS A-Out	2255 A	2255 A/Out	SOC SEC	NLRB	P C DIV	P C FED	U S CIV	TAX COURT	BKCY	Oth Agcy Review	CIVIL RIGHTS	TAX D C	SCHOOL	CROSS APPEAL		
												X						84-4169

CIRCUIT 5 APPEAL ____ FROM ____ DISTRICT OF ____ AT TEXAS CASE

DATE DOCKETED 03/19/84 $65 FEE PAID 03/19/84 JUDGE ____

DATE NOTICE OF APPEAL FILED ____

D C DOCKET NUMBER ICC No. 39627 REPORTER ____

STATE OF TEXAS,

Petitioner,

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents.

RECEIVED
JUL 3 12 PM '84
INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL

CONSOLIDATED WITH 84-4386

APPEARANCE FILED—DATE	CODE	ATTORNEYS FOR APPELLANT	ARG
		Jim Mattox, AG, P.O. Box 12548, Capitol Station, Austin, TX 78711 (512) 475-1101	
3/29/84	I	Justin Scott Wilson Asst. AG	✓
		open	

APPEARANCE FILED—DATE	CODE	ATTORNEYS FOR APPELLEE	ARG
		John Broadley, General Cnsl., ICC, 12th & Constitution Ave., N.W., Room 5137, Wash., DC 20423	
4/12/84	K	H. Glenn Scammel, -do- 275-1846	✓
5/1/84	✓	John P. Legendre, [illegible] North Industrial Blvd., Dallas TX 75207 (214/760-3062)	✓
06/19/84	I	John J. Powers, III, Dept of Just., Rm. 3313, Antitrust Div., Main Bldg., 10th & Pa. Ave.,N.W., Wash.,D.C. 20530 FTS-633-2414)	
06/19/84	X	John P. Fonte -do-	

(1)

(2)

TITLE STATE OF TEXAS v. USA v. ICC

NO. 84-4169

1. RECORD, EXHIBITS AND BRIEF INFORMATION | Filing:

- 4/27/84 — Partial Record or Cert. List
- 10/1/84 — Record on Appeal — No. of Vols. 1 ✓
- _____ — Supp. Record — No. of Vols. _____
- _____ — Second Supp. Record — No. of Vols. _____
- _____ — Third Supp. Record — No. of Vols. _____
- _____ — Exhibits ☐ Env. ☐ Box ☐ Pkg ☐ Roll
- _____ — Exhibits ☐ Env. ☐ Box ☐ Pkg. ☐ Roll
- 7-5-84 — Appendix ☐ (P) ☐ (M)
- _____ — Record Excerpts
- _____ — Supp. Certified List
- _____ — Briefing Notice Issd.
- 7-5-84 — Brief for Appellant — OK - 7/2
- _____ — Brief for Appellant
- _____ — Brief for Appellant
- _____ — Brief for Cr. Appellant
- 9/12/84 — Brief for Appellee
- _____ — Brief for Appellee
- _____ — Brief for Appellee
- _____ — Brief for Cr. Appellee
- NOV 1 1984 — Reply Brief for Appellant
- _____ — Reply Brief for Cr. Appellant
- _____ — Supp. Brief for Appellant
- _____ — Supp. Brief for Appellee
- 09-28-84 — Brief for Amicus/Intervenor (Missouri-Kansas, etc.)
- _____ — Rule 28(j) letter—Appellant
- 11-19-84 — Rule 28(j) letter—Appellee (J)
- 6/27/85 — " " " (J)
- 9.12.85 — " " Appellant (J)

MISCELLANEOUS FILINGS | Filing:

- _____ — Dup. Notice of Appeal and Clerk's Statement of Docket Entries
- _____ — Papers Trans. from Misc. No.
- _____ — Order of DC Granting Appeal IFP
- _____ — Order of DC Appointing Counsel
- _____ — Affidavit of Financial Status
- _____ — CJA 20 Issd./Voucher Recd.

AGENCY REVIEW CASES | Filing:

- 03/19/84 — Petition for Review of Order ( ) of ☐ NLRB ☐ FERC XX ICC ☐
- _____ — Application for Enforcement—NLRB
- _____ — Answer to Application for Enforcement
- _____ — Cross Application for Enforcement

4. EXTENSION Fig. Motion for: | Order Fld. | Ext. to:

- _____ — Transcript
- _____ — Transcript
- _____ — Transcript
- 5/23/84 — Appellant's Brief (GR) — 6/21/84
- 6/18/84 — Appellant's Brief — 7/2/84
- _____ — Appellant's Brief
- 8/1/84 — Appellee's Brief — 9/5/84
- 9/5/84 — Appellee's Brief — 9/10/84 NC
- _____ — Appellee's Brief
- 10/11/84 — Reply Brief — 10/22/84
- 10/22/84 — 10/29/84

5. CALENDAR INFORMATION Week of 2-4-85

- Special Panel _____
- Summary Panel: _____
- 12-26-84 — Case Assigned for 2-6-85 in ☐ EB ☑ W ☐ E ☐ _____
- _____ — Case Cont'd for Reassignment _____
- _____ — Case Reassigned for _____ in ☐ EB ☐ W ☐ E ☐
- Hearing Panel: RGG - HAP - WED
- 2-6-85 — Case Argued ☑ by Appellant ☑ by Appellee
- _____ — Case Sub. w/o Arg. ☐ by Appellant ☐ by Appellee

6. OPINION INFORMATION ✓

- 9/6/85 — Opinion Rendered — Also fld in 84-4386 (Issd 9/12)
- ☐ Affirmed ☐
- HAP — Reversed
- ☐ Affd. in Pt. ☐ P.C. ☐ Conc. Spec.
- ☐ Vacated XX Signed ☐ Dis.
- ☐ Dismissed ☐ Rule 21 ☐ Dis. in Pt.
- _____ — Opinion Withdrawn

7. REHEARING INFORMATION

- 9/25/85 (J) — Mot. for Ext.—Ext. to: — See SN 9/12 — 10/26/85 Rqst Ext
- _____ — Mot. for Ext.—Ext. to:
- OCT 25 1985 — Petition for Rehearing (J)
  ☐ Appellant ☐ Appellee ☑ Reg. ☐ En Banc
- 10-28-85 — Petition for Rehearing (J) (USA + ICC) also fld 84-4386
  ☐ Appellant ☑ Appellee ☐ Reg. ☑ En Banc
- _____ — Response of
- NOV 15 1985 — Order Denying Rehearing w/o pull
  ☐ Dissenting
- _____ — ☐ Opinion S9
- _____ — ☐ Order on Petition for Rehearing S9

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84-4169

(3)

8. MOTIONS

Filing Motion to or for	Response Filed By	Date	Granted	Denied	By Court	By Clerk	Date
Mandamus							
Reinstate Appeal							
Stay Further Proceedings in CA							
Stay Pending Appeal							
Injunction Pending Appeal							
Consolidate Appeals W/							
Leave to Appeal IFP							
Bail Pending Appeal							
Withdraw as Counsel							
Appointment of Counsel							
Supplement Record							
Expedite							
File Brief in Excess Pgs							
File Brief in Excess Pgs.							
Dismiss by Appellant							
Dismiss by Appellee							
Amicus Curiae							
File Supp. Brief							
1-22-85 Stay of Mandate			HAP ✓		✓		11-27-85
1-22-86 Recall of Mandate	-Dkt. 1/23/86 (HAP)		✓			✓	3-21-86 HAP
Intervene	MPRR Co.		✓			✓	4/9/84
Intervene							
File Reply Br. out of time							

9. OTHER DOCKET ENTRIES

4/10/84	Flg. Motion for leave to intervene MPRR Co. (GRANTED 4/17/84 GB)
"	Flg. Motion for leave to intervene SPTCo. (GRANTED 4/17/84 GB)
4/25/84	Flg. Certificate of alignment of Intervenor, PT Co.
10/4/84	Flg. Unopposed motion of respondents to consolidate cases for oral argument and to adopt respondents' joint brief in 84-4169 as their brief in 84-4386. (GRANTED 10/4/84 GB)
1/22/85	Flg. Unopposed motion of Intervenors for additional time for oral argument. (Not to exceed 1/23/85)
1/28/85	Flg. Order GRANTING motion of intervenors for enlargement of time for respondent's oral argument from 20 to 25 minutes . HAP
1/28/85	Flg. ICC's letter dtd 1/24/85 with opinions attached. (CE).
10/30/85	Flg. letter of respondent, ICC&U.S.A. dtd. 10/29/85 enclosing a copy of page 5 of petition for rehearing en banc to be substituted for page 5 of the petition. (JT)

10. JUDGMENT OR MANDATE INFORMATION

1-23-85	Bill of Costs ✓
	Flg. & Entg. Judgment
	Issg. Copy of Jdgt. to Bd & Cnsl.
	Mandate Stayed to 1-21-86
01/22/86	Jdgt. as Mdt. Issd. to Clerk
	Jdgt. as Mdt. Reissd. to Clerk
	Dismissal Issd. to Clerk
01/22/86	Record on Appeal Retd. to Clerk - 1 volume
	Exhibits Retd. to Clerk

11. SUPREME COURT INFORMATION 85-1222

	Notice of Appeal to S.C.
	Preparing Proceedings on Certiorari
	Preparing Supp. Proceedings on Cert. 1-17
	Transmitting Orig. Exhibits to S.C.
	Order of S.C.—Ext. to
1-30-86	Notice of Flg. of Cert. Pet. on 1/21/86
6/5/86	Order of S.C. ☐ Denied ☑ Granted 6/24/86
	Notice of Denial of Pet. for Rehearing
	Opinion of S.C. dated
	Judgment of S.C.

3

303 MR 111 (2)

SUBJECT																		CROSS APPEAL NO.	CASE NUMBER
CRIM	PRIS w/	PRIS w/out	2255 w/	2255 w/out	SOC SEC	NLRB	P C DIV	P C FED	U S CIV	TAX COURT	BKCY	Oth Agcy Review	CIVIL RIGHTS	TAX D C	SCHOOL	CROSS APPEAL			84-4386
												XX							

CIRCUIT 5 APPEAL ____ FROM ____ DISTRICT OF ____ AT TEXAS CASE

DATE DOCKETED 06/11/84 $65 FEE PAID in C.A. JUDGE -------

DATE NOTICE OF APPEAL FILED --------

D C DOCKET NUMBER ICC NO. 39704 REPORTER -----

3

STATE OF TEXAS,

Petitioner,

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

CONSOLIDATED WITH 84-4169

Respondents.

APPEARANCE FILED—DATE	CODE	ATTORNEYS FOR APPELLANT	ARG
		Jim Mattox, AG, P.O. Box 12548-Capitol Station, Austin	
6/27/84	..	Justin Scott Wilson, -do- TX, 78711 (512) 475-1101	✓

OPEN

APPEARANCE FILED—DATE	CODE	ATTORNEYS FOR APPELLEE	ARG
		John Broadley, Gen. Cnsl., ICC, 12th & Constitution	
10/10/84	✓	H. Glenn Scammel -do- Ave., N.W., Room 5137 Washington, D.C., (202/275-1846) 20423	✓
		Wm. F. Smith, AG, U.S.D.O.J., 10th & PA Ave., N.W.,	
7/27/84		John J. Powers,III, Rm. 3313, Washington, D.C., 20530	
7/27/84	X	John P. Fonte -do- (for Intervenor-RRTC)	
7/18/84		Keith G. O'Brien, 1729 H St. N.W., Wash. D. C. 20006	
7/18/84	X	Edward [illegible] Wheeler, -do- (202) 337-6500	
5/1/84		John P. Legendre, 505 No. Industrial Blvd. Dallas, TX 75207 214-760-3062	✓

4

(5)

TITLE: STATE OF TX -vs- USA & ICC.

No. 84-4386

1. RECORD, EXHIBITS AND BRIEF INFORMATION	Filing:
DEC 13 1984 Partial Record or Cert. List	
10/25/84 Record on Appeal	No. of Vols. 1 ✓
Supp. Record	No. of Vols.
Second Supp. Record	No. of Vols.
Third Supp. Record	No. of Vols.
Exhibits ☐ Env. ☐ Box ☐ Pkg. ☐ Roll	
Exhibits ☐ Env. ☐ Box ☐ Pkg. ☐ Roll	
Appendix ☐ (P) ☐ (M)	
9-6-84 Record Excerpts	
Supp. Certified List	
Briefing Notice Issd. 7/23/84	
9-6-84 Brief for Appellant	
Brief for Appellant	
Brief for Appellant	
Brief for Cr. Appellant	
Brief for Appellee	
Brief for Appellee	
Brief for Appellee	
NOV 1 1984 Brief for Cr. Appellee	
Reply Brief for Appellant	
Reply Brief for Cr. Appellant	
Supp. Brief for Appellant	
Supp. Brief for Appellee	
Brief for Amicus	
10-4-84 Intervenor (RRTC)	
Rule 28(j) letter—Appellant	
11-19-84 Rule 28(j) letter—Appellee (J)	
" " " Appellant (J)	

4. EXTENSION Flg. Motion for:	Order Fld.	Ext. to:
Transcript		
Transcript		
Transcript		
Appellant's Brief		
Appellant's Brief		
Appellant's Brief		
Appellee's Brief		
Appellee's Brief		
Appellee's Brief		
10/11/84 Reply Brief		10/22/84
10/22/84		10/29/84

5. CALENDAR INFORMATION Week of 2-4-85

Special Panel

Summary Panel:

12-28-84 Case Assigned for 2-6-85 in ☐ EB ☒ W ☐ E ☐

Case Cont'd for Reassignment

Case Reassigned for in ☐ EB ☐ W ☐ E ☐

Hearing Panel: RGG-HAP-WED

2-6-86 Case Argued ☒ by Appellant ☒ by Appellee

Case Sub. w/o Arg. ☐ by Appellant ☐ by Appellee

6. OPINION INFORMATION

9/6/85 Opinion Rendered (Also fld in 84-4169 (sold 9/12/85))

	Affirmed				
HAP	Reversed				
	Affd. in Pt.		P.C.		Conc. Spec.
	Vacated	XX	Signed		Dis.
	Dismissed		Rule 21		Dis. in Pt.

Opinion Withdrawn

MISCELLANEOUS FILINGS	Filing:
Dup. Notice of Appeal and Clerk's Statement of Docket Entries	
Papers Trans. from Misc. No.	
Order of DC Granting Appeal IFP	
Order of DC Appointing Counsel	
Affidavit of Financial Status	
CJA 20 Issd./Voucher Recd.	

AGENCY REVIEW CASES	Filing:
06/11/84 Petition for Review of Order ( ) of ☐ NLRB ☐ FERC ☒ ICC ☐	
Application for Enforcement—NLRB	
Answer to Application for Enforcement	
Cross Application for Enforcement	

7. REHEARING INFORMATION See SN 9/17

9/25/85 Mot. for Ext.—Ext. to: 10/26/85 (Rep)

Mot. for Ext.—Ext. to:

10-28-85 Petition for Rehearing (J)(U.S.A.+ICC) 84-4116

☐ Appellant ☒ Appellee ☐ Reg. ☒ En Banc

Petition for Rehearing

☐ Appellant ☐ Appellee ☐ Reg. ☐ En Banc

Response of

NOV 15 1985 Order Denying Rehearing W/O Poll

☐ Dissenting

☐ Opinion S9

☐ Order on Petition for Rehearing S9

5

84-4386

	Response Filed By	Date	Granted	Denied	By Court	By Clerk	Date
Mandamus							
Reinstate Appeal							
Stay Further Proceedings in CA							
Stay Pending Appeal							
Injunction Pending Appeal							
Consolidate Appeals W/							
Leave to Appeal IFP							
Bail Pending Appeal							
Withdraw as Counsel							
Appointment of Counsel							
Supplement Record							
Expedite							
File Brief in Excess Pgs.							
File Brief in Excess Pgs							
Dismiss by Appellant							
Dismiss by Appellee							
Amicus Curiae							
File Supp. Brief							
11-23-85 Stay of Mandate			HAP		✓		11-27-85
12-3-85 Recall of Mandate	Appl. 1/28/86 (LAF)		✓				2/3/86
6-25-84 Intervene (RRTC)					✓		9/6/84
Intervene							
File Reply Br. out of time							

9. OTHER DOCKET ENTRIES

7/13/84	Flg. Certificate of alignment of intervenor.
10/4/84	Flg. Unopposed motion of respondents to consolidate cases for oral argument and to adopt respondents' joint brief in 84-4169 as their brief in 84-4386. (GRANTED 10/4/84 GB)
1/22/85	Flg. Unopposed motion of Intervenors in 84-4169 for additional time for oral argument. (Set 1/28/85)
1/28/85	Flg. Order GRANTING motion of intervenors in 84-4169 for enlargement of time for respondent's oral argument from 20 to 25 minutes HAP
1/28/85	Flg. ICC's letter dtd 1/24/85 with opinions attached. (CE)

10. JUDGMENT OR MANDATE INFORMATION

7-23-85	Bill of Costs ✓
	Flg. & Entg. Judgment
	Issd. Copy of Jdgt. to Bd & Cnsl
	Mandate Stayed to 1-21-86
01/22/86	Jdgt. as Mdt. Issd. to Clerk
	Jdgt. as Mdt. Reissd. to Clerk
	Dismissal Issd. to Clerk
01/22/86	Record on Appeal Retd. to Clerk - 1 volume
	Exhibits Retd. to Clerk

11. SUPREME COURT INFORMATION 85-1222

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	Preparing Proceedings on Certioran
	Preparing Supp. Proceedings on Cert.
	Transmitting Orig. Exhibits to S.C.
	Order of S.C.—Ext. to
1-30-86	Notice of Flg. of Cert. Pet. on 1/21/86
6/5/86	Order of S.C. ☐ Denied ☒ Granted 6/2/86
	Notice of Denial of Pet. for Rehearing
	Opinion of S.C. dated
	Judgment of S.C.

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BEFORE THE
RAILROAD COMMISSION OF TEXAS

Docket No. 000149RRMI

EXEMPTION OF TEXAS INTRASTATE TRAILER ON FLATCAR (TOFC) AND CONTAINER ON FLATCAR (COFC) SERVICE FROM REGULATION

APPLICATION OF MISSOURI-KANSAS-TEXAS RAILROAD COMPANY FOR AN EXEMPTION FROM REGULATION

MICHAEL E. ROPER
Attorney for Applicant
MISSOURI-KANSAS-TEXAS
RAILROAD COMPANY
701 Commerce Street
Dallas, TX 75202
(214) 651-6741

Dated: September 17, 1982

BEFORE THE
RAILROAD COMMISSION OF TEXAS

Docket No. 000149RRMI

EXEMPTION OF TEXAS INTRASTATE TRAILER ON FLATCAR (TOFC) AND CONTAINER ON FLATCAR (COFC) SERVICE FROM REGULATION

APPLICATION OF
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
FOR AN EXEMPTION FROM REGULATION

This application is filed by Missouri-Kansas-Texas Railroad Company (MKT) under Rule RCT 051.03.30.011(b) and seeks an exemption from rail carrier regulation for Trailer on Flatcar (TOFC) and Container on Flatcar (COFC) traffic moving intrastate in the State of Texas. The scope of the exemption sought is the same as was granted by the Interstate Commerce Commission in Ex Parte No. 230 (Sub-No. 5), *Improvement of TOFC/COFC Regulation*, served February 19, 1981, as clarified on June 17, 1981, and June 21, 1982 (365 ICC 728).

The Applicable Standard for Consideration of the Exemption

It is clear that this Commission in determining whether to grant the exemption sought herein must apply the standards set forth in 49 USC 10505. See Ex Parte No. 388, *State Intrastate Rail Rate Authority*, 365 ICC 855 (1982). Those standards provide that this Commission shall exempt a person, class of persons, or a transaction or service upon a finding that regulation is not necessary to carry out the transportation policy of 49 USC 10101a, and

either the transaction or service is of limited scope or regulation is not needed to protect shippers from an abuse of market power.

This Commission's rules are somewhat at variance with the applicable standard which must be applied. For example, RCT 051.03.30.011(a) provides that the Commission *may* exempt if rate regulation is not necessary to carry out the policy of the Commission. Under the applicable standard discussion above, this Commission must grant an exemption if continued regulation is not necessary to carry out the transportation policy as set out in 49 USC 10101a and if either of the two conditions discussed above is met.

Texas Intrastate TOFC/COFC Service Meets the Requirements for Exemption

MKT believes that the Commission must grant an exemption for Texas intrastate TOFC/COFC service. Continued regulation of this service is not necessary to carry out the transportation policy of 49 USC 10101a. In fact, continued regulation is directly contrary to that policy in that it inhibits the fostering of sound economic conditions in transportation and the ensuring of effective competition between rail carriers and other modes. Also, an exemption from regulation would further the transportation policy by helping the development and continuation of a sound rail system with effective competition.

An exemption of Texas intrastate TOFC/COFC service is of limited scope and is of such a nature that continued regulation is not necessary to protect shippers from an abuse of market power. The Commission is well aware of the keen competition between rail carriers and motor carriers for Texas intrastate traffic. The existence of such competition protects shippers from any potential abuses of market power by the rail carriers with regard to intrastate TOFC/COFC service in Texas. The small amount

of TOFC/COFC traffic moving intrastate in Texas shows conclusively that such an exemption would be of limited scope.

Finally, there is no reason to regulate Texas intrastate TOFC/COFC traffic while Texas interstate TOFC/COFC traffic is exempt from regulation. A TOFC/COFC movement should be treated the same regardless of whether it moves interstate or intrastate. The same reasons for exempting interstate TOFC/COFC traffic, as found by the Interstate Commerce Commission, also apply to intrastate TOFC/COFC traffic in Texas. It is an anomalous situation to regulate one and not the other. There simply is no reason for a disparity in treatment.

MKT therefore respectfully requests the Commission to issue appropriate notices for this application for an exemption and to grant an exemption from regulation for all TOFC/COFC traffic moving intrastate in Texas.

Respectfully submitted,

MISSOURI-KANSAS-TEXAS
RAILROAD COMPANY

/s/ MICHAEL E. ROPER

Michael E. Roper
701 Commerce Street
Dallas, TX 75202
(214) 651-6741

RAILROAD COMMISSION OF TEXAS
TRANSPORTATION DIVISION

Docket No. 000149RRMI
NOTICE NO. 7989
DATE ISSUED: October 19, 1983

APPLICATION OF
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
TRAILER ON FLATCAR (TOFC) AND CONTAINER ON
FLATCAR (COFC), TEXAS RAIL INTRASTATE–
EXEMPT FROM REGULATION

PROPOSAL FOR DECISION

HOLLY C. NOELKE
PRESIDING EXAMINER

STATEMENT OF THE CASE

This case involves the application of Missouri-Kansas-Texas Railroad Company (MKT) to exempt from regulation intrastate trailer on flatcar (TOFC) and container on flatcar (COFC) traffic to the extent that it is exempted by the Interstate Commerce Commission. Six railroads, the Texas Industrial Traffic League, and three shippers appeared in support of the exemption. No railroads or shippers appeared in opposition to the exemptions. The only opposition to the application was lodged by the Common Carrier Motor Freight Association.

The examiner has concluded that, under the relevant statutory authority, TOFC/COFC service should be exempted from intrastate regulation. The examiner does not

recommend exemption of either motor carrier service conducted in connection with TOFC/COFC service or of service performed by roadrailer vehicles.

Parties of Record

For the Applicant:	Applicant
Michael E. Roper	Missouri-Kansas-Texas Railroad Company
For the Intervenors in Support:	Intervenors in Support:
Virgil O. Musick	Texas Industrial Traffic League
Hugh L. McCulley	Southern Pacific Transportation Company
John P. Legendre	Missouri Pacific Railroad Company
Robert B. Burns	Atchison, Topeka, and Santa Fe Railway Company
Donald L. Turkal	Burlington Northern Railroad Company Fort Worth and Denver Railway Company
For the Intervenors in Opposition: Ed Ward	Intervenors in Opposition: Common Carrier Motor Freight Association

Nature of the Case

The applicant in the instant proceeding seeks to exempt trailer on flatcar and container on flatcar traffic from intrastate regulation in the state of Texas to the extent that it has been exempted in interstate commerce by the Interstate Commerce Commission.

Procedural History of the Case

Date Filed: September 27, 1982

Published in Notice No. 7989

Date Heard: December 2, 1982

Current Status: Protested

FINDINGS OF FACT

After a review of the record as a whole, the examiner has determined that the following findings of fact are supported by substantial evidence:

1. The Missouri-Kansas-Texas Railroad Company (MKT) filed an application with the Railroad Commission of Texas (RCT) to exempt from regulation the transportation of trailer on flatcar (TOFC) and container on flatcar (COFC) traffic moving in Texas intrastate commerce to the same extent as interstate TOFC/COFC traffic has been exempted by the Interstate Commerce Commission (ICC). (Application)

2. The following entities filed interventions and testified in support of the application: Southern Pacific Transportation Company (SP), Atchison, Topeka and Santa Fe (AT & SF), Missouri Pacific Railroad Company (MP), Burlington Northern Railroad Company (BN), the Fort Worth and Denver Railroad Company (FW & D), and the Texas Industrial Traffic League (TITL). The TITL is an organization representing over 100 Texas shippers and/or receivers. (Tr. 4-5, 75)

3. The only entity which expressed opposition to the application was the Common Carrier Motor Freight Association (CCMFA). (Ex. 3, and Statement of Position filed by CCMFA, Dated December 14, 1982)

4. The MKT averaged, at the time of hearing, ninety-two TOFC/COFC shipments per month in Texas intrastate commerce and anticipated doubling this traffic within three years if the exemption is granted. The SP handled fewer shipments than the MKT and at that time the other intervening railroads handled no Texas intrastate TOFC/COFC traffic. (Tr. 21-22, 33, 91, 129, 136, 142)

5. The modes of transportation which are major competitors with TOFC/COFC are private motor carriage, regulated motor carriers which utilize dry vans, and rail boxcars. (Tr. 22-23, 123)

6. The MKT, SP, AT & SF, MP, BN, and FW & D have TOFC/COFC facilities at limited points on their lines and intend to participate in the movements of Texas intrastate TOFC/COFC traffic if the exemption is granted. (Tr. 35, 82, 134, 138, 145, 146)

7. A concentration of market power is unlikely because of the constraints inherent in rail transportation which do not allow movement of time sensitive traffic, the movement of shipments to points off the rail lines, and the complete pickup, delivery, and linehaul service performed by motor carriers. (Tr. 22, 33, 54, 73, 122)

8. The Texas intrastate TOFC/COFC rates charged by each rail carrier are currently published in tariffs filed with the RCT. Any amendments to the tariffs must be filed with the RCT at least ten days (for reductions) or twenty days (for increases) before the rates can become effective. (Tr. 19, 20, 39)

9. The ICC has exempted from regulation interstate TOFC/COFC traffic, which allows the carriers to charge rates without filing them with the ICC. (Tr. 32; Ex.2)

10. If TOFC/COFC traffic were exempt in Texas, rail carriers would have flexibility in setting rates and be able to negotiate rates with the shippers without the prior filing of rates with the RCT. In negotiating rates with the shippers, the carriers include such factors as the commodity,

the distance, the points of origin and destination, the volume tendered and the availability of equipment. (Tr. 108-109, 128-129, 131, 144-145)

11. The limited current tender of Texas intrastate TOFC/COFC inhibits the carriers' ability to fill their flatbed equipment with two trailers or containers, to obtain backhauls, to optimize the use of their equipment, and to create priority service TOFC/COFC trains. (Tr. 27, 34, 139, 146).

DISCUSSION

The Missouri-Kansas-Texas Railroad Company (MKT) filed an application with the Railroad Commission of Texas (RCT) to exempt from regulation the transportation of trailer on flatcar (TOFC) and container on flatcar (COFC) traffic moving in Texas intrastate commerce to the same extent as interstate TOFC/COFC service has been exempted by the Interstate Commerce Commission (ICC). The Southern Pacific Transportation Company (SP), the Atchison, Topeka, and Santa Fe Railway Company (AT & SF), the Missouri Pacific Railway Company (MP), the Burlington Northern Railroad Company (BN), the Fort Worth and Denver Railroad Company (FW &D), and the Texas Industrial Traffic League (TITL) filed interventions in support of the application, and testified in support of the exemption. Opposition to the application was lodged by the Common Carrier Motor Freight Association (CCMFA), which intervened and filed a statement of position in opposition to the application.

Scope of Application

This application does not involve service by the railroads on vehicles known as "roadrailers". The exemption of roadrailer service is being addressed in a separate application pending before the RCT, under Docket No. 025806ZZR.

In addition, this proceeding does not involve the exemption of trucking operations performed by the railroads in connection with TOFC/COFC service. The issue before the RCT is whether TOFC/COFC service is to be exempted. TOFC/COFC service is transportation on a *rail car* of freight laden trucks, trailers, semi-trailers, or their container portions, or empty trucks, trailers, semi-trailers, or their container portions when they are moving incidental to prior or subsequent use in TOFC/COFC service.

In its decision in Ex Parte 230, the ICC addressed the exemption of both TOFC/COFC service *and* trucking operations conducted by the railroads in connection with TOFC/COFC service. The instant application filed with the RCT is limited to the exemption of intrastate TOFC/COFC service itself. The public is not on notice that related trucking operation exemptions would be addressed in this proceeding. Furthermore, even if, arguendo, the notice problem were absent, the applicant did not present evidence of the scope of such trucking operations or evidence relating to whether rate regulation is necessary to protect shippers from the abuse of market power relative to any exemption of trucking operations performed by the railroads in connection with TOFC/COFC service.

In fact, the railroads testified, as the basis for the proposed exemption of the rail movements, that TOFC/COFC traffic is limited, and therefore, not susceptible to a concentration of market power because rail transportation does not allow the movement of shipments to points off the rail lines and complete pickup and delivery and linehaul service performed by motor carriers. If both the ground and rail movements were exempt then the railroads would be at a competitive advantage over the regulated intrastate motor carrier service.

The applicant may, of course, file an application to exempt railroad trucking operations performed in connection with TOFC/COFC operations, providing it can show jurisdiction under 40 U.S. Code ¢10505 [sic] to exempt such service. This issue is not reached by the examiner herein.

Exemption of TOFC/COFC Service

TOFC/COFC traffic is currently exempt from regulation when moving interstate. This allows rail carriers the flexibility to compete with other modes of transportation and with each other by rapidly negotiating rates with the shippers without the delay inherent in filing the rates with the ICC. This is contrasted with Texas intrastate movements where the railroads are required to file all rates and rate changes with the RCT before rates can be effective. This results in a delay of at least ten days before the Texas intrastate rates can go into effect. The other modes of transportation which are major competitors of TOFC/COFC are private motor carriage, regulated motor carriers which utilize dry vans, and rail box cars.

Rail transportation, including TOFC/COFC, is subject to certain inherent constraints. The rail carriers cannot provide the rapid movement that the motor carriers are able to provide, nor can they serve points off the rail lines or points which do not have the facilities to accommodate TOFC/COFC traffic. Furthermore, the rail carriers cannot provide the complete pickup, linehaul, and delivery service provided by the motor carriers. The traffic which is susceptible to TOFC/COFC service is therefore limited.

To the extent that shipments are susceptible to TOFC/COFC service, the railroads must provide a cost incentive to shippers for using TOFC/COFC instead of motor carrier service, since the rail carriers cannot compete with the service of the motor carriers.

The rail carriers consider the following criteria in negotiating rates with shippers: the commodity to be moved, the distance, the points of origin and destination,

the volume tendered and the availability of equipment. In order to optimize their operations, the railroads need adequate traffic to load two trailers or containers on each flatcar, and to provide a backhaul for the containers and/or trailers. If enough TOFC/COFC traffic were tendered to the rail carriers, they would be able to create priority service TOFC/COFC trains which would enhance their service to the shippers.

The six railroads which participated in this hearing have facilities to handle TOFC/COFC traffic at limited points on their lines. The carrier currently transport TOFC/COFC shipments interstate. Only the MKT and the SP are currently transporting any Texas intrastate TOFC/COFC traffic. If the exemption were granted, all six carriers would participate in this service, but none anticipate a great diversion of traffic from motor carriers.

In Ex Parte No. 230 (Sub-No. 5) decided by the ICC on February 19, 1981, the ICC concluded that the TOFC/COFC traffic was highly competitive with motor carrier service, that intramodal rail competition was active, and that service problems were an impediment to successful marketing of TOFC/COFC service. The same conclusion may be reached with respect to intrastate trailer on flatcar and container on flatcar traffic, based n [*sic*] the record in the instant proceeding.

Truck service performed by motor carriers will continue to be regulated by the RCT. This will have minimal impact on the railroads, because, as pointed out in testimony by the railroads, virtually all of the various TOFC/COFC plans used by shippers involving prior or subsequent movements by truck are within RCT established commercial zones and as such are already exempt from RCT jurisdiction.

CONCLUSIONS OF LAW

Applicable Law

The instant proceeding is governed by the provisions of 49 U.S. Code §§ 10505 and 10101a. These sections provide, in pertinent part, that:

> "(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under the subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle (1) is not necessary to carry out the transportatin policy of section 10101a of this title; and (2) either (a) the transaction or service is of limited scope, or (b) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power." [§ 10505]
>
> "In regulating the railroad industry, it is the policy of the United States Government (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required; (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission; (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the need of the public and the national defense; (5) to foster sound economic conditions in transportation and to ensure effective competition among rail carriers with other modes, to meet the needs of the

public and the national defense; (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital; (7) to reduce regulatory barriers to entry into and exit from the industry; (8) to operate transportation facilities and equipment without detriment to the public health and safety; (9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle; (10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation; (11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability; (12) to encourage fair wages and safe and suitable working conditions in the railroad industry; (13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination; (14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and to encourage and promote energy conservation." [§ 10101a]

Applicable Rules

This case is also governed by the provisions of 16 TAC § 5.561 (RCT 051.03.30.011) of the Special Rules of Practice and Procedure in Rail Rate Cases. This rule provides, in pertinent part, that:

"The Commission may exempt a transaction or service when the Commission finds that rate regulation is not necessary to carry out the policy of the Com-

mission; and either: (1) the transaction or service is of limited scope or (2) rate regulation is not needed to protect shippers from the abuse of market power."

Conclusion

The examiner concludes that the regulations and rules currently applicable on TOFC/COFC traffic are not necessary to carry out either national transportation policies or RCT transportation policies; that the service is of limited scope; and, that the regulation of Texas intrastate TOFC/COFC traffic is not necessary to protect shippers from the abuse of market power.

RECOMMENDATION

The examiner therefore recommends that the Commission grant the exemption of Texas intrastate TOFC/COFC traffic.

/s/HOLLY C. NOELKE
Holly C. Noelke
Presiding Examiner

HCN/g

RAILROAD COMMISSION OF TEXAS
TRANSPORTATION DIVISION

DOCKET NO. 000149RRMI

RAILROAD FREIGHT CIRCULAR NO. 35710

TRAILER ON FLATCAR (TOFC) AND CONTAINER ON FLATCAR (COFC), TEXAS RAIL INTRASTATE–EXEMPT FROM REGULATION

Date Issued: December 5, 1983

FINAL ORDER

In conference at its office in Austin, Texas, the Railroad Commission of Texas finds that after statutory notice was given to the public and to all interested parties, the above-styled cause was heard by an examiner who made and filed a proposal for decision containing the examiner's findings of fact and conclusions of law. This proposal for decision was properly served and all parties were given an opportunity to file exceptions and replies as part of the record herein, under the provisions of 16 TAC § 5.443 (RCT 051.03.50.043).

The Commission, after review and due consideration of the proposal for decision, the findings of fact and conclusions of law contained therein, hereby adopts as its own the findings of fact and conclusions of law contained in the proposal for decision and incorporates said findings of fact and conclusions of law as if fully set out and separately stated herein.

The Commission concludes that the application of Missouri-Kansas-Texas Railroad Company is reasonable as modified and should be approved.

Accordingly, it is ordered by the Railroad Commission of Texas that, Trailer on Flatcar (TOFC) and Container on Flatcar (COFC) rail traffic moving intrastate in the State of Texas be, and the same is hereby exempted from regulation by the Railroad Commission of Texas. (This exemption shall not apply to incidental pre-rail and ex-rail over-the-road movements.)

RAILROAD COMMISSION OF TEXAS

Effective December 20, 1983.

Chairman

[signed] BUDDY TEMPLE
Commissioner

Attest:

/s/ LOLA WILSON
Secretary

[signed] JIM NUGENT
Commissioner

HDN/g

RAILROAD COMMISSION OF TEXAS
TRANSPORTATION DIVISION

Docket No. 025806ZZR
NOTICE NO. 8006
DATE ISSUED: January 17, 1984

APPLICATION OF
ROAD-RAIL TRANSPORTATION CO. INC.; USE OF
ROADRAILER EQUIPMENT IN INTERMODAL OPERATIONS
INTRASTATE BETWEEN HOUSTON AND DALLAS-FT. WORTH
VIA ROAD-RAIL TRANSPORTATION COMPANY, INC.—
EXEMPT RAIL SERVICE FROM REGULATION.

PROPOSAL FOR DECISION

JIM B. CLOUDT
PRESIDING EXAMINER

STATEMENT OF THE CASE

Summary

This case involves the application of Road-Rail Transportation Company, Inc. to exempt from regulation intrastate transportation service in Road-Rail equipment between Houston and Dallas-Ft. Worth. There were no appearances in support or opposition to the exemption.

The Examiner has concluded that, under the relevant, statutory authority, rail service in Road-Rail equipment should be exempted from intrastate regulation. The examiner does not recommend exemption of motor carrier service conducted in Road-Rail equipment.

Parties of Record

For the Applicant:	Applicant:
Keith G. O'Brien	Road-Rail Transportation
Henry A. Fahl	Co., Inc.

Nature of the Case

The petitioner in this proceeding seeks the use of Roadrailer equipment in intermodal operations intrastate between Houston and Dallas-Ft. Worth via Road-Rail Transportation Company, Inc. – Exempt rail service from regulation.

Procedural History of the Case

Date Filed:	May 16, 1983
Published in Notice No.	8006
Date Heard:	August 10, 1983
Hearing Exhibits Received:	November 14, 1983
Current Status:	Unprotested

All motions and objections not heretofore disposed of are hereby overruled or denied. All persons or entities by which protests or interventions in opposition were filed but which did not appear at the hearing are hereby stricken as parties to this proceeding.

FINDINGS OF FACT

After due consideration of the record as a whole, the hearings examiner has determined that the following findings of fact are supported by substantial evidence:

1. Road-Rail Transportation, Inc. (Road-Rail) filed an application with the Railroad Commission of Texas (RCT) to exempt from regulation transportation service in Road-Rail equipment (Roadrailers) between Dallas and Ft. Worth, Texas. (Application)

2. Roadrailers are specially designed carriage vehicles which will operate in a rail mode or a highway mode. (Application, Tr. 10). The current Road-Rail units are forty-five foot dry vans, but may eventually include refrigerated and tank units. (Ex. 5, 6, and 9)

3. Road-Rail service between Houston and Ft. Worth/Dallas will be part of a service between Chicago, Ill., and Houston called the South-West Xpress. (Tr. 39; Ex. 7 and 8)

4. An agreement was negotiated between Road-Rail and the Burlington-Northern Railway (BN) whereby Road-Rail would supply the carriage equipment and BN would provide the locomotive power for the South-West Xpress. (Tr. 42; Late Filed Exhibits 3 and 4)

5. Road-Rail proposes to offer three types of service in intermodal movements on both highways and rails:

> PLAN A Movement in Road-Rail equipment owned or leased on a long-term basis by shippers, forwarders or truck lines,
>
> PLAN B Same as A except that the equipment is rented on a daily basis;
>
> PLAN C Door-to-door movement with Road-Rail providing for consolidation, pickup and delivery service between customer's facilities and rail terminals of either origin or destination. (Application)

6. In Finance Docket No. 29898 (Exhibit 12), the ICC reaffirmed that interstate Road-Rail transportation is exempted from ICC regulation under 49 U.S.C. § 10505 pursuant to Ex Parte 230 (Sub-No. 5). *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (Sub-No. 5). In Docket No. 29898, the ICC also concluded that interstate operations under Plan C which would otherwise require motor carrier operation authority are also exempt from ICC regulation under Ex Parte No. 230 (Sub-No. 5).

7. Road-Rail plans to solicit road traffic as far as economics allow, conceivably a distance as far as from Houston to the Harlingen-Brownsville area. (Tr. 88)

8. Road-Rail will experience competition in rail service from highway carriage, both private and common, railroads, and TOFC/COFC movements. The availability of transportation options for rail movements protects shippers from abuse of market power. (Tr. 82)

9. The availability of transportation alternatives make[s] rate regulation of Road-Rail rail service unnecessary to carry out the policy of the Commission as defined at 16 TAC § 5.551 and 49 U.S.C. § 10101a.

10. Road-Rail will comply with all state highway rules and regulations. (Tr. 100)

DISCUSSION

In Ex Parte 230 (Sub.-No. 5), *Improvement of TOFC/COFC Regulation*, 364 ICC 731, (1981) (X-230), the ICC exempted from regulation interstate railroad operations involving TOFC/COFC movements whether conducted on railroad flatcars or trucks that are owned and operated by railroads. As a footnote to that decision, the ICC stated that it intended the exemption to extend to Road-Rail equipment and any other equipment developed for use in intermodal service. The position of the ICC was reaffirmed in Finance Docket No. 29898, *Road-Rail Transportation Company, Inc.—Petition for Exemption* decided August 18, 1982 wherein the ICC held that the operations of Road-Rail are covered by the TOFC/COFC exemption already granted and excluded Road-Rail from reporting and accounting requirements.

In X-230 and Docket No. 29898, the ICC concluded that an exemption was proper because regulation was not necessary to carry out the transportation policy of 49 U.S.C. 10101a and because the exemption would not allow Road-Rail to abuse market power. The ICC believed

that shippers have abundant transportation alternatives such as motor carrier or TOFC/COFC service. The ICC observed that under Plan C, Road-Rail would be providing motor freight or motor carrier service and would ordinarily have to obtain operating authority and file appropriate tariffs as a motor carrier. The ICC concluded, however, that since the service was to be provided by a rail carrier, Road-Rail, the motor carrier service should also be exempt. In this application, Road-Rail seeks an exemption of the same scope as that granted by the Interstate Commerce Commission.

In Docket No. 000149RRMI, decided December 5, 1983, the Railroad Commission of Texas exempted TOFC/COFC intrastate rail movements from regulation. The decision in that docket reserved for determination any exemption regarding Road-Rail movements. The scope of the TOFC/COFC exemption granted did not include an exemption for "incidental pre-rail or ex-rail over-the-road movements." Order, Docket No. 000149RRMI.

Pursuant to 16 TAC § 5.561 the Railroad Commission may exempt a rail transaction or service from regulation when the Commission finds that rate regulation is not necessary to carry out the policy of the Commission and either (1) the transaction or service is of limited scope or (2) rate regulation is not needed to protect shippers from the abuse of market power. Road-Rail urges that rate regulation is not necessary to carry the policy of the Commission or to protect shippers from the abuse of market power because of the availability of transportation alternatives. (Tr. 82).

The examiner concludes that although the railroad movement in Road-Rail equipment may be limited to rail corridors, the scope of the application as proposed is not sufficently limited to ensure the availability of transporta-

tion alternatives.[1] Road-Rail testified that it will solicit ground movement of traffic as far as the economics dictate. Road-Rail envisions solicitation of road traffic to Houston from points as far as Brownsville and the Valley, a distance of over 300 miles. The line-haul movement by rail from Houston to Dallas will be approximately 240 miles (Houston and Dallas are the only scheduled intrastate stops of the South-West Xpress). Accordingly, Road-Rail will be soliciting road transportation at distances greater than it will be moving the traffic by rail. (Tr. 42). In those instances, Road-Rail's primary business will be motor carriage.

Secondly, although Road-Rail's application, and the scope of this proceeding is limited to the South-West Xpress, Road-Rail may seek to institute further movements in the state. (Tr. 96). Any further extensions would require Commission approval, but as of this time the number of potential routes is unknown.[2] Subsequent applications, legally indistinguishable from this one, would logically need to follow the decision rendered here. A grant of a series of motor and rail exemptions could irreparably injure efficient for hire motor carriage in the state.

---

[1] Road-Rail primarily urged that regulation is not necessary to protect shippers from the abuse of market power. The Examiner is of the opinion that based on this record, Road-Rail could not prevail on the alternative ground, that the service is limited in scope, for the same reasons advanced herein.

[2] There was some discussion at the hearing wherein Road-Rail stated its belief that this application would grant a statewide exemption for Road-Rail equipment (Tr. 96). The Examiner believes such a broad exemption is not possible in this proceeding as the scope is limited to the notice issued in Notice No. 8006 which is limited to the movements between Houston and Dallas/Ft. Worth.

Thirdly, it is not clear from the record that "economics" would even restrict Road-Rail movements to joint road-rail movements. Although Road-Rail witnesses testified that economics would dictate that the road movement would need to be tied to a rail movement partially because of the higher cost of Road-Rail equipment, about twice the cost of a conventional forty-five foot van, (Tr. 98-99), the same witness also testified that the cost of road operation of Road-Rail equipment is equivalent to road carriers. (Tr. 60). Conceivably, Road-Rail could solicit additional ground movement between ground movement points at rates somewhat over variable cost but less than Commission set rates in order to optimize the capacity of its vehicles. This carriage could include common carriage in dry vans as well as movements requiring specialized equipment such as refrigerated or tank units.

The Commission must be concerned about the viability of motor carriage for at least two reasons. One, a healthy motor carriage industry is the predicate for this exemption. One of the protections to shippers from the abuse of market power by Road-Rail is the availability of transportation alternatives. Motor common carriage is a major one.

Secondly, pursuant to TEX. REV. CIV. STAT. ANN. art. 911b § 4(d), the Commission is charged to regulate motor carriers "so as to carefully preserve, foster and regulate transportation." An exemption for railroad motor carriage would place the exemption power of the Commission at war with its regulatory duty. Road-Rail has not submitted any authority that would relieve the Commission of its regulatory duty other than the ICC action regarding interstate traffic.

The Examiner's recommendation is also consistent with the decision of the Commission regarding the TOFC/COFC exemption. In Proposal for Decision, the examiner found that TOFC/COFC rail movements are limited in scope and not susceptible to a concentration of

market power because rail transportation alone does not allow the movement of shipments to points off the rail lines. Thus TOFC/COFC rail movements cannot provide the complete pick up, delivery and line-haul service performed by motor carriers. The Examiner stated, "If both the ground and rail movements were exempt then the railroads would be at a competitive advantage over regulated intrastate state motor carrier service." Proposal for Decision, Docket No. 00149RRMI, p. 6. The examiner noted that TOFC/COFC traffic is subject to certain inherent constraints in that rail carriers cannot serve points off rail lines or points which do not have the facilities to accommodate TOFC/COFC traffic.

CONCLUSIONS OF LAW

Applicable Law

The instant proceeding is governed by the provisions of 49 U.S. Code §§ 10505 and 10101a which provide, in pertinent part, that:

> "(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle (1) is not necessary to carry out the transportation policy of section 10101a of this title; and (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power." [§ 10505]

Applicable Rules

This case is also governed by the provisions of 16 TAC § 5.561 (RCT 051.03.30.011) of the Special Rules of Prac-

tice and Procedure in Rail Rate Cases. This rule provides, in pertinent part, that:

> "The Commission may exempt a transaction or service when the Commission finds that rate regulation is not necessary to carry out the policy of the Commission; and either: (1) the transaction or service is of limited scope or (2) rate regulation is not needed to protect shipper from the abuse of market power."

RECOMMENDATION

Accordingly, the examiner recommends that Road-Rail's application be granted in part, and denied in part. The movement of commodities in Road-Rail equipment should be exempted to the extent the movements are conducted by rail. The highway movement of commodities in Road-Rail equipment should not be included within the exemption.

JIM B. CLOUDT

Jim B. Cloudt
Presiding Examiner

JBC/ca

[EXAMINER'S DRAFT ORDER]

RAILROAD COMMISSION OF TEXAS
TRANSPORTATION DIVISION

Docket No. 025806ZZR
RAILROAD FREIGHT CIRCULAR NO.

ROADRAILER EQUIPMENT IN INTERMODAL OPERATIONS INTRASTATE BETWEEN HOUSTON AND DALLAS-FT. WORTH VIA ROAD-RAIL TRANSPORTATION COMPANY, INC. — EXEMPT RAIL SERVICE FROM REGULATION.

FINAL ORDER

In conference at its office in Austin, Texas, the Railroad Commission of Texas finds that after statutory notice was given to the public and to all interested parties, the above-styled cause was heard by an examiner who made and filed a proposal for decision containing the examiner's findings of fact and conclusions of law. This proposal for decision was properly served and all parties were given an opportunity to file exceptions and replies as part of the record herein, under the provisions of 16 TAC § 5.443 (RCT 051.03.50.043).

The Commission, after review and due consideration of the proposal for decision, the findings of fact and conclusions of law contained therein, hereby adopts as its own the findings of fact and conclusions of law contained in the proposal for decision and incorporates said findings of fact and conclusions of law as if fully set out and separately stated herein.

The Commission concludes that the application of Road-Rail Transportation Co., Inc. should be granted in part and denied in part.

Accordingly, it is ordered by the Railroad Commission of Texas that rail traffic moving intrastate in the State of Texas in bimodal (rail or highway) equipment owned and/or operated by Road-Rail Transportation Co., Inc. on a rail route between Houston, and Ft. Worth-Dallas, Texas (excluding intermediate and subsequent points); in conjunction with the Burlington-Northern Railway (such route to be part of an interstate route between Chicago, Ill. and Houston known as the "South-West Xpress") be, and the same is hereby exempted from regulation by the Railroad Commission of Texas. This exemption shall not apply to incidental pre-rail and ex-rail over-the-road movements.

Effective

RAILROAD COMMISSION OF TEXAS

RAILROAD COMMISSION OF TEXAS
TRANSPORTATION DIVISION

Docket No. 025806ZZR
RAILROAD FREIGHT CIRCULAR NO. 35718
DATE ISSUED: February 28, 1984

ROADRAILER EQUIPMENT IN INTERMODAL OPERATIONS INTRASTATE BETWEEN HOUSTON AND DALLAS-FT. WORTH VIA ROAD-RAIL TRANSPORTATION COMPANY, INC.— EXEMPT RAIL SERVICE FROM REGULATION.

FINAL ORDER

In conference at its office in Austin, Texas, the Railroad Commission of Texas finds that after statutory notice was given to the public and to all interested parties, the above-styled cause was heard by an examiner who made and filed a proposal for decision containing the examiner's findings of fact and conclusions of law. This proposal for decision was properly served and all parties were given an opportunity to file exceptions and replies as part of the record herein, under the provisions of 16 TAC § 5.443 (RCT 051.03.50.043).

The Commission, after review and due consideration of the proposal for decision, the findings of fact and conclusions of law contained therein, and exceptions thereto, hereby adopts as its own the findings of fact and conclusions of law contained in the proposal for decision and incorporates said findings of fact and conclusions of law as if fully set out and separately stated herein. Each exception to the proposal for decision is hereby expressly overruled.

The Commission concludes that the Application No. 432 of Road-Rail Transportation Co., Inc. should be granted in part and denied in part.

Accordingly, it is ordered by the Railroad Commission of Texas that rail traffic moving intrastate in the States of Texas in bimodal (rail or highway) equipment owned and/or operated by Road-Rail Transportation Co., Inc. on a rail route between Houston, and Ft. Worth-Dallas, Texas (excluding intermediate and subsequent points); in conjunction with the Burlington-Northern Railway (such to be part of a route between Chicago, Ill. and Houston known as the "South-West Xpress") be, and the same is hereby exempted from regulation by the Railroad Commission of Texas. This exemption shall not apply to incidental pre-rail and ex-rail over-the-road movements.

Effective March 8, 1984.

RAILROAD COMMISSION OF TEXAS

[signed] MACK WALLACE
Chairman

ATTEST:

[signed] BUDDY TEMPLE
Commissioner

LOLA WILSON
Secretary

[signed] JIM NUGENT
Commissioner

JBC/ca

Supreme Court of the United States

No. 85-1222

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

TEXAS, ET AL.

ORDER ALLOWING CERTIORARI. Filed June 2, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. This case is consolidated with 85-1267, *Missouri-Kansas-Texas Railroad Company, et al.* v. *Texas, et al.*, and a total of one hour is allotted for oral argument.

Supreme Court of the United States

No. 85-1267

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL., PETITIONERS

v.

TEXAS , ET AL.

ORDER ALLOWING CERTIORARI. Filed June 2, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. This case is consolidated with 85-1222, *Interstate Commerce Commission* v. *Texas, et al.*, and a total of one hour is allotted for oral argument.

U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/20524

(6) (4)

No. 85-1222 and No. 85-1267

Supreme Court, U.S.
FILED
JUL 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

STATE OF TEXAS,
Respondent,

AND

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONERS MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, AND SOUTHERN PACIFIC TRANSPORTATION COMPANY

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QUESTION PRESENTED

May the Interstate Commerce Commission, under 49 U.S.C. 10505 and 49 U.S.C. 11501, exempt from regulation the motor truck portion of intrastate TOFC/COFC service performed by a rail carrier as part of a continuous intermodal move, consistent with its exemption of interstate TOFC/COFC service?

LIST OF PARTIES

State of Texas was petitioner in the case below in the Fifth Circuit Court of Appeals.

United States of America and Interstate Commerce Commission were respondents.

Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company and Southern Pacific Transportation Company[1] were intervenors in support of United States of America and Interstate Commerce Commission.

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[1] A list of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Petitioners may be found in the Petition for Writ of Certiorari filed by Petitioner in No. 86-1267.

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No. 85-1222 and No. 85-1267

In The

Supreme Court of the United States

October Term, 1985

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

STATE OF TEXAS,
Respondent,

AND

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONERS MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, AND SOUTHERN PACIFIC TRANSPORTATION COMPANY

I.

OPINION BELOW

The decision of the Court of Appeals for the Fifth Circuit is reported at 770 F.2d 452 (1985), and a copy appears at page 1a of the Appendix to the Petition for a

Writ of Certiorari (Appendix) filed by the Interstate Commerce Commission in this proceeding. The decision of the Interstate Commerce Commission (ICC) in Docket No. 39627 appears at page 16a of the Appendix.

II.
JURISDICTION

The judgment below was entered on September 6, 1985. The Court of Appeals entered an order denying petitions for rehearing and the suggestions for rehearing *en banc* on November 15, 1985. A copy of the order is in the Appendix at page 12a. This Court has jurisdiction under 28 U.S.C. Sec. 1254(1).

III.
STATUTES INVOLVED

The statutes involved in this proceeding are 49 U.S.C. 11501, 10505, and 10101a. Copies may be found at pages 30a, 37a, and 41a of the Appendix, respectively.

IV.
STATEMENT OF THE CASE

The issue to be decided in this case is whether the State of Texas, which has no authority to regulate intra-

state transportation provided by a rail carrier,[2] may nevertheless assert jurisdiction over a portion of intrastate TOFC/COFC transportation provided by a rail carrier as part of a continuous intermodal move. TOFC/COFC service has been exempted in interstate service and, as shown below, the states are required to follow that federal standard. If the decision below stands, the State of Texas will be able to reassert jurisdiction over intrastate transportation provided by a rail carrier simply by employing a definition of "transportation" which differs from the one used by the ICC and accepted by the courts.

In *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981), *aff'd.* in *American Trucking Assns v. Interstate Commerce Commission*, 656 F.2d 1115 (5th Cir. 1981) (*ATA*), the ICC, under 49 U.S.C. 10505, exempted from regulation the movement of trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) rail traffic. The exemption included both rail and truck transportation provided by a rail carrier as part of a continuous intermodal move. *ATA, supra*, at 1120.

On September 27, 1982, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company and Southern Pacific Transportation Company (Railroads), requested the Railroad Commission of Texas (RCT) to apply the same exemption to Texas intrastate rail TOFC/

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[2] The Railroad Commission of Texas lost its authority to regulate intrastate rail rates, classification, rules and practices when it was denied certification by the Commission in Ex Parte No. 388 (Sub-No. 31), *State Intrastate Rail Rate Authority—Texas*, 1 ICC 2d 26 (1984), *aff'd* in *Railroad Commission of Texas v. United States*, 765 F.2d 221 (D.C. Cir. 1985) (*RCT*).

COFC traffic.[3] In response, the RCT granted a partial exemption. The exemption covered the rail but not the truck portion of the intrastate TOFC/COFC transportation provided by a rail carrier.

The Railroads then petitioned the ICC under 49 U.S.C. 11501(c) to review the RCT's decision and to grant the full TOFC/COFC exemption. The ICC, in Docket No. 39627. *Petition Under 49 U.S.C. 11501(c) by Missouri-Kansas-Texas Railroad Company, et al., for Review of an Order of the Railroad Commission of Texas,* served January 23, 1984, not printed, granted Railroads' petition and made the exemption fully applicable to Texas intrastate TOFC/COFC transportation provided by a rail carrier. (See Appendix, p. 16a.)

The State of Texas sought judicial review and the Fifth Circuit Court of Appeals rendered the judgment below on September 6, 1985. The Commission held that the ICC did not have the authority to apply the full TOFC/COFC exemption to Texas intrastate transportation provided by a rail carrier. Instead, the Court of Appeals agreed with the RCT that truck service provided by a rail carrier as a part of a continuous intrastate intermodal move was motor carrier service and, therefore, subject to state regulation. *State of Texas v. United States,* 770 F.2d 452 (5th Cir. 1985) (*Texas*). (See Appendix, p. A-1.) The Court reached this conclusion even though

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[3] At that time the RCT had been provisionally certified to regulate intrastate rail transportation. *State Intrastate Rail Authority—P.L. 96-448,* 364 I.C.C. 881 (1981). Railroads' application to the RCT sought an exemption on intrastate TOFC/COFC traffic identical to the interstate exemption granted by the ICC. See Joint Appendix pp. 7-10.

the same circuit had earlier held in *ATA* that such service was rail transportation when performed in interstate commerce. The petitions for rehearing and suggestions for rehearing *en banc* were denied on November 15, 1985. (See Appendix, p. 12a.)

V.

ARGUMENT

A. THE ICC HAS AUTHORITY UNDER 49 U.S.C. 10505 TO EXEMPT THE MOTOR PORTION OF INTRASTATE TOFC/COFC TRANSPORTATION PROVIDED BY A RAIL CARRIER.

The starting point in analyzing the issue before the Court is the plenary power of Congress under the Constitution. As was held long ago in *Gibbons v. Ogden,* 9 Wheat 1, 195 (1824), Congress' power under the Commerce Clause:[4]

> "is the power to regulate; that is to prescribe the rule by which commerce is to be governed. This power like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitation other than prescribed in the constitution."

Furthermore, this Court has held that

> [t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise

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[4] U.S.C.A. Const. Art. 1, Section 8, Clause 3.

> of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 258; 83 S.Ct. 348; 13 L.Ed. 2d 258 (1964).

This Court has also recognized that the Interstate Commerce Act (ICA) is among the most pervasive and comprehensive of federal regulatory schemes. *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile,* 450 U.S. 311, at 318; 101 S.Ct. 1124; 67 L.Ed.2d 258 (1981). And, at least since the turn of the century, this Court has

> "frequently invalidated attempts by the States to impose on common carriers obligations that are plainly inconsistent with the plenary authority of the Interstate Commerce Commission or with congressional policy as reflected in the Act." *Chicago & N.W. Tr. Co., supra,* p. 318.

Measured against the power of Congress over interstate and intrastate commerce (as it affects or burdens interstate or foreign commerce), it is clear that Congress delegated sufficient authority to the ICC under 49 U.S.C. 10505 to enable the ICC to exempt both the rail and truck portion of intrastate TOFC/COFC transportation provided by a rail carrier. The ICC's exemption power was intended to give the ICC the broad authority needed to eliminate unnecessary regulation. *Coal Exporters Ass'n of U.S. v. United States,* 745 F.2d 76 (D.C. Cir. 1984); *cert. den.,* 105 S.Ct. 2151; 85 L.Ed.2d 507 (1985).

The ICC's exemption power with regard to intermodal transportation was also clearly recognized by Congress in

the Staggers Rail Act of 1980 (Staggers).[5] 49 U.S.C. 10505(f) provides that

> "[t]he Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement."

This special treatment of intermodal transportation is a clarification of the ICC's general exemption authority provided in 49 U.S.C. 10505(a). This authority was recognized by the court in *Brae Corp. v. United States,* 740 F.2d 1023, at 1044 (D.C. Cir. 1984); *cert. den.,* 105 S.Ct. 2149; 85 L.Ed.2d 505 (1985).

The ICC's power to exempt both the rail and truck portion of TOFC/COFC transportation provided by a rail carrier as part of a continuous intermodal move was upheld by the Fifth Circuit in *ATA.* The Court in *ATA,* in response to an argument that Commission authority to exempt transportation provided by a rail carrier meant only rail transportation, stated

> "[w]e disagree—rail-owned truck TOFC/COFC service is 'transportation that is provided by a rail carrier.' Had the Congress intended to limit the Commission's authority to rail transportation, it could easily have done so by using that language." *ATA, supra,* p. 1120.

Congress' power under the Commerce clause is plenary in nature and extends clearly to intrastate regulation as well. Congress has delegated to the ICC power to exempt certain classes of traffic from regulation when certain cir-

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[5] Pub. L. No. 96-448, 94 Stat. 1895.

cumstances are present. The ICC used that power to exempt both the rail and truck portions of TOFC/COFC transportation provided by a rail carrier as part of a continuous intermodal movement. Once the ICC exercised that power to exempt both the rail and truck portions of TOFC/COFC interstate service, the same exemption automatically applied to both the rail and truck portions of intrastate TOFC/COFC service. *Illinois Commerce Commission v. ICC, infra (Illinois).* If the decision below is not overturned, Congress' policy of having uniformity in both interstate and intrastate railroad regulation will be frustrated. This policy, set out in 49 U.S.C. 11501(b)(1), was upheld in *State of Tex. v. United States,* 730 F.2d 339 (5th Cir. 1984); *cert. den.,* 105 S.Ct. 267; 83 L.Ed.2d 203 (1984).

B. THE DECISION BELOW WILL RESULT IN THE CREATION OF UNWORKABLE AND UNNECESSARY DISPARITIES BETWEEN INTERSTATE AND INTRASTATE COMMERCE.

The decision below, if allowed to stand, will enable the RCT to regulate intrastate TOFC/COFC service provided by a rail carrier even though the RCT has absolutely *no* authority to regulate intrastate rail rates, classifications, rules, or practices. The RCT lost its authority because of its persistent and continuous refusal to follow the Federal standards and procedures as required by 49 U.S.C. 11501. See *RCT, supra,* at pp. 224-226.

The denial of certification by the ICC means that the RCT has no jurisdiction at all over intrastate rail transportation pursuant to 49 U.S.C. 11501(b)(4)(B) which provides that

> "[a]ny intrastate transportation provided by a rail carrier in a State which may not exercise jurisdiction over an intrastate rate, classification, rule or practice of that carrier due to a denial of certification under this subsection shall be deemed to be transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title."

There is no question that the transportation in issue—truck service provided by a rail carrier as part of a continuous intermodal move—is intrastate transportation provided by a rail carrier under 11501(b)(4)(B). The Fifth Circuit has even acknowledged that the transportation in question is transportation by rail carrier. See *ATA*, *supra*, at p. 1120. It is the ICC, therefore, and not the RCT, which has jurisdiction over truck service provided by a rail carrier as part of a continuous intermodal move. The decision below is simply wrong. Unless certified by the ICC, the RCT has no jurisdiction over any intrastate rail transportation.

If the decision below is allowed to stand, an unreasonable and unnecessary disparity in the treatment of interstate and intrastate TOFC/COFC shippers will result. If a TOFC/COFC shipment is interstate and involves truck service provided by a rail carrier as part of a continuous intermodal move, then the shipment is exempt from regulation. The interstate shipper will have the benefit and flexibility of deregulated transportation. On the other hand, an intrastate shipper's TOFC/COFC truck service provided by a rail carrier as part of continuous intermodal move would face more rigid regulations. This disparity is the precise evil that the Staggers Act was designed to eliminate.

Congress, in passing the Staggers Act, concluded that one of the problems facing the railroad industry was the "multiple and diverse regulations at the state level." H.R. No. 96-1035, 96th Cong. 2d Sess. 128 (1980). The solution adopted by Congress is contained in Section 214 of the Staggers Act (49 U.S.C. 11501) which limits "[s]tate authority over intrastate transportation . . . to administering the provisions of the Interstate Commerce Act." H.R. Conf. Rep. 96-1430, 96th Cong. 2d Sess. 83 (1980). The Conference Committee reported that its intent was to

> "ensure the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals. Accordingly, the Act preempts state authority over rail rates, classifications, rules and practices. States may only regulate in these areas if they are certified under the procedures of this section." H.R. Conf. Rep. 96-1430, *supra*, p. 106.

Allowing the decision below to stand will frustrate the expressed Congressional policy of uniformity between interstate and intrastate rail regulation. In addition, the Railroads and shippers will suffer real and tangible harm as a result of a double standard. Both interstate and intrastate TOFC/COFC shipments move in the same trailers on the same trains. Yet if the decision below is upheld, the Railroads will be forced to provide different and more expensive handling to intrastate shipments than to interstate shipments, contrary to the intent of Congress in passing Section 11501. The following example is illustrative.

Suppose one shipper wants to make a TOFC shipment from Houston to Texarkana, Arkansas, and another shipper a TOFC shipment from Houston to Texarkana, Texas. Further, suppose the rail carrier the first shipper chose will move the shipment from Houston by rail to Dallas and then via its own truck to Texarkana, Arkansas. That move would be subject to the exemption and would be deregulated. The other shipper wanting to use the same rail service from Houston to Texarkana, Texas, would face quite a different situation. The rail carrier could move the shipment from Houston to Dallas over its tracks, but in order to move the shipment in its own truck service to Texarkana, Texas, it would have to either (1) obtain a certificate from the RCT to operate between Dallas and Texarkana (which would involve publishing tariffs and operating as a regulated motor carrier); or (2) use the services of an independent certificated motor carrier. The cost of using such motor carrier service would make the overall TOFC/COFC move more expensive, and thus non-competitive, with line-haul motor carrier service.

If the RCT is successful in regulating the motor portion of a continuous intermodal move by a rail carrier, it will be able to assert effective economic regulation over the entire intermodal move. The effect of such economic regulation by the RCT is shown by the principle announced in *Oil Field Haulers Association v. Railroad Commission of Texas*, 381 S.W.2d 183, 192-195 (Tex 1964). That case stated that rail rates could be unreasonable if they caused competitve harm to intrastate truck lines even though the rail rates were compensatory to the rail carriers. This Texas rule, which effectively barred rail rate competition with trucks, was abolished by the Staggers Act. The Stag-

gers Act requires the states to apply federal regulatory standards to rail regulation. Nevertheless, Texas seeks in this case to revert to its prior rule by redefining "transportation provided by a rail carrier."

Neither the RCT nor the decision below provides any explanation of why such disparate treatment is needed, required, or even desirable. Both types of services are rail transportation, whether interstate or intrastate. Railroads submit there can be no justification for such disparity of treatment and that such disparity is contrary to the Staggers Act. See *Illinois, infra.* The standards should be the same for both interstate and intrastate shippers and rail carriers.

The example discussed above is similar to the example discussed by the ICC in *State Intrastate Rail Rate Authority-P.L. 96-448,* 367 I.C.C. 149 (1983) (*State*), aff'd in *Illinois, infra.* After discussing an interstate TOFC move from Chicago, Illinois, to St. Louis, Missouri, and an intrastate TOFC move from Chicago to East St. Louis, Illinois, the ICC concluded

> "that Congress did not intend for the continued existence of State regulation that would produce this awkward result—namely, interference with the railroads' and shippers' freedom to take advantage of permitted flexibility in doing business under the Staggers Act." *State, supra,* p. 153.

The Court of Appeals, responding weakly to the reasoning upheld in *Illinois,* stated that

> "to accept uncritically the I.C.C.'s argument that it can exempt intrastate trucking connected with intrastate rail travel from all regulation would be to court potential mischief." *Texas, supra,* p. 454.

The court then discusses the example of a hypothetical Texas intrastate railroad move of TOFC shipments only a small distance by rail and then a long distance by rail-owned truck. This example of a sham transaction is purely the result of hypothesis and conjecture by the court and cannot be found anywhere in the record. However, even if there was such a railroad move, the court does not say why this is a potential mischief and, most importantly, does not balance this unsubstantiated "mischief" against the real problem faced by Texas railroads and shippers if they must handle the truck portion of interstate TOFC as deregulated traffic and the truck portion of intrastate TOFC as regulated traffic.[6] It is worth mentioning that the small intrastate railroad that so worried the court below (if such a railroad exists) would not be subject to ICC regulation unless it connected with an interstate railroad. *Magner-O'Hara Scenic Ry. v. I.C.C.*, 692 F.2d 441 (6th Cir. 1982). The ICA simply cannot be invoked to frustrate state authority where the basis for invoking the Federal authority is, as in the Court's hypothetical, a sham. *Hudson Transportation Co. v. U.S.*, 219 F. Supp. 43 (D.C.N.J. 1963), aff'd *sub nom, Arrow Carrier Corp. v. U.S.*, 375 U.S. 452 (1964).

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[6] Indeed it is clear that under 49 U.S.C. 10523(a)(2) that the truck portion of TOFC service within the rail terminal area is regulated as rail transportation. Under the decision below, the RCT would retain the right to regulate that traffic, and that retention is flatly inconsistent with a federal statutory standard.

C. THE DECISION BELOW UNDERCUTS THE STATUTORY SCHEME UPHELD IN THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS DECISION IN ILLINOIS COMMERCE COMMISSION v. I.C.C.

The decision below undercuts the statutory scheme upheld in *Illinois*, 749 F.2d 875 (D.C. Cir. 1984); *cert. den.*, 106 S.Ct. 70 (1985). In *Illinois* the court of appeals affirmed an ICC decision holding that if an exemption on interstate rail transportation is granted by the ICC under 49 U.S.C. 10505, that exemption automatically applies with equal application to intrastate rail transportation. The court of appeals found that

> "[i]n view of the overriding importance of the exemption provisions, it was reasonable for the ICC to conclude that the statute required States to give immediate and automatic effect to federal exemptions." *Illinois, supra,* p. 884.

In fact, the ICC decision which was reviewed in *Illinois* specifically considered the TOFC/COFC exemption in reaching the decision. In *State, supra,* p. 153, the decision reviewed in *Illinois,* the Commission found that

> "[b]ecause section 10505, and its underlying policy, is such a significant aspect of the Staggers Act, Congress could not have intended the practical problems and inconsistencies that would result from States retaining jurisdiction over classes of traffic exempted nationwide by the Commission."

The ICC's rationale, upheld in *Illinois,* was that different treatment of interstate and intrastate TOFC/COFC traffic "would cause unjustifiable operational and/or marketing difficulties for the railroads conducting business for the same class of traffic under both a regulated and un-

regulated environment." *State, supra,* p. 153. The decision below squarely conflicts with the holding of *Illinois* because it allows a different treatment for interstate and intrastate TOFC/COFC traffic.

The decision below also conflicts with *Illinois* in that it allows the RCT to frustrate application of the TOFC/COFC exemption to the truck portion of that intrastate service provided by a rail carrier. By refusing to recognize that the motor portion of intrastate TOFC/COFC service is service provided by a rail carrier, the court below has allowed the RCT to reassert jurisdiction over intrastate rail rates, classification, rules and practices. That result is completely at odds with the *Illinois* decision which held that exemptions adopted by the ICC automatically become Federal standards that must be applied by the states if they want to continue to regulate intrastate rail rates, classification, rules and practices. See also *Illinois Central Gulf R.R. Co. v. ICC,* 702 F.2d 111 (7th Cir. 1983); *Wheeling-Pittsburgh Corp. v. ICC,* 723 F.2d 346 (3rd Cir. 1983); and *Utah Power & Light Co. v. ICC,* 747 F.2d 721 (D.C. Cir. 1985), *supplemented on rehearing,* 764 F.2d 865 (D.C. Cir. 1985).

It must be remembered that the TOFC/COFC exemption adopted by the ICC and upheld by the Fifth Circuit in *ATA, supra,* at p. 1120, found that rail-owned truck TOFC/COFC service was indeed transportation provided by a rail carrier. Under the rationale of *Illinois,* the RCT was obliged, under its provisional certification in effect at that time, to apply the full TOFC/COFC exemption to Texas intrastate rail transportation.

The result of the decision below is to create a basic conflict between the Fifth Circuit and the District of Columbia

Circuit over whether the Congress, acting through the ICC, or the states have the final say over what constitutes service provided by a rail carrier. While conceding that the ICC does have jurisdiction over intrastate rail transportation (See *Texas, supra,* at p. 454), the court below nevertheless allows the RCT to reassert jurisdiction over the intrastate rail transportation by saying that the truck portion of a continuous intermodal move provided by a rail carrier is actually motor carrier service. If the RCT is allowed to reassert jurisdiction in this manner, the Congressional preemption of intrastate rail regulation will be undercut. See *Illinois, supra,* at p. 878. Railroads believe the *Illinois* court is correct in holding that the ICC has the necessary power and authority to determine the applicability of its exemptions to intrastate rail transportation. The court below held that the states may determine the applicability of exemption to intrastate rail transportation and Railroads believe the court below was in error.

D. THE DECISION BELOW IS ALSO CONTRARY TO THIS COURT'S RECENT PRECEDENT.

In *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board,* 474 U.S. —; 106 S.Ct. 709; 88 L.Ed.2d 732 (1986) (*Transco*), this Court considered the power of the states to regulate in areas Congress has decided are to be governed by market forces. In that case, the question was whether Congress had intended to give power to the states that it had denied to the Federal Energy Regulatory Commission (FERC). This Court stated clearly that

> "[i]n light of Congress' intent to move toward a less-regulated national natural gas market, its decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the States to impose additional regulations." *Transco, supra,* 88 L.Ed. 2d 744.

That finding is based on the premise that

> "a federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision to regulate (emphasis in original)." *Transco, supra,* at p. 744.

The action of the State of Mississippi in that case was also found to be contrary to federal policy because the action would disrupt the uniformity of the federal regulatory scheme and would raise the ultimate price of natural gas to consumers. *Transco, supra,* at p. 745.

The facts in this case are closely analogous to those in the *Transco* case. As in the *Transco* case, Congress in passing the Staggers Act, decided to rely more on market forces and less on regulation with regard to rail service. In 49 U.S.C. 10101a(1)(2), Congress has declared federal policy to be "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;" and "to minimize the need for Federal regulatory control over the rail transportation system . . . ." Further, as discussed above, Congress clearly preempted state regulation in 49 U.S.C. 11501 in order to carry out the policy to "assure that intrastate regulators' jurisdiction is exercised in accordance with [federal] standards." 49 U.S.C. 10101a(9).

Applying the holding of *Transco* to the facts in this case, it becomes clear that the decision below cannot stand. Congress, in the Staggers Act, decided to rely on less regulation and Texas is not free to step in and replace that regulation. In addition, if Texas is allowed to regulate the motor portion of intrastate TOFC/COFC transpor-

tation provided by a rail carrier, the result as in *Transco* would be to disturb the uniformity of the federal regulatory scheme and would ultimately raise prices to shippers in Texas. Interstate and intrastate TOFC/COFC shipments would have to be handled differently even though moving in the same trains and on the same flatcars. Railroads would incur higher costs because of the disparate handling and the shippers would have to pay these costs.

The decision below cannot be reconciled with this Court's decision in *Transco*. If anything, the facts at issue here are more egregious because the Staggers Act clearly preempts state rail regulatory authority except where the state regulates in accordance with federal standards and procedures.

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VI.

CONCLUSION

Wherefore, railroads respectfully request the Court to reverse the decision below.

Respectfully submitted,

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v.

STATE OF TEXAS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

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QUESTION PRESENTED

Whether the State of Texas may regulate, as motor carriage, the motor portion of intrastate trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) transportation provided by interstate rail carriers using their own trucks.*

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* This is a more concise statement of the questions presented in the petition for a writ of certiorari in No. 85-1222.

PARTIES TO THE PROCEEDINGS

The petitioner in No. 85-1222 is the Interstate Commerce Commission and the petitioners in No. 85-1267 are Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, and Southern Pacific Transportation Company. Road-Rail Transportation Company, Inc., and the United States of America were also parties in the court of appeals.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1222

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS

No. 85-1267

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL., PETITIONERS

v.

STATE OF TEXAS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a)[1] is reported at 770 F.2d 452. The decisions of

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 85-1222. "J.A." refers to the joint appendix.

the Interstate Commerce Commission (Pet. App. 16a-23a, 24a-29a) are unreported.

JURISDICTION

The judgments of the court of appeals (Pet. App. 8a-9a, 10a-11a) were entered on September 6, 1985. Petitions for rehearing en banc were denied on November 15, 1985 (Pet. App. 12a-13a). The petitions for a writ of certiorari were filed on January 21, 1986 (No. 85-1222) and January 24, 1986 (No. 85-1267) and were granted on June 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See 28 U.S.C. 2350(a).

STATUTES INVOLVED

Relevant provisions of the Interstate Commerce Act, as amended, 49 U.S.C. 10101a, 10501, 10505, 10521, and 11501, are set out at Pet. App. 30a-44a.

STATEMENT

A. The Statutory Background

After nearly a century of extensive federal regulation of railroads under the Interstate Commerce Act, ch. 104, 24 Stat. 379, 49 U.S.C. 10101 *et seq.* (1887), and efforts to improve and moderate that regulatory pattern,[2] Congress enacted the Staggers Rail Act

[2] In 1976, Congress passed the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 31 *et seq.* One of the features of the 4R Act was its authorization to the Commission to exempt services or transactions of "limited scope" where regulation was determined to impose an "undue burden" and to "serve little or no useful public purpose" (§ 207, 90 Stat. 42). Before making or revoking an exemption, the Commission was required to provide notice and an opportunity for a hearing to interested

of 1980 (Staggers Act), Pub. L. No. 96-448, 94 Stat. 1895, 49 U.S.C. 10101 *et seq.* The premise of the Staggers Act was that the railroads' financial difficulties of the 1970s [3] and earlier were due in substantial part to two causes: disparate state and federal standards applying to the industry, see, *e.g.*, H.R. Rep. 96-1035, 96th Cong. 2d Sess. 61 (1980), and excessive governmental regulation at both the federal and state levels (see, *e.g.*, *id.* at 38, 128-130; H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 79 (1980); see generally *Illinois Commerce Comm'n* v. *ICC*, 749 F.2d 875, 877-878 (D.C. Cir. 1984), cert. denied, No. 84-1829 (Oct. 7, 1985)).

The Staggers Act sets forth a 15-element National Rail Transportation Policy, 49 U.S.C. 10101a. Among those elements are the following (49 U.S.C. 10101a):

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parties (*ibid.*). Also under the 4R Act, Congress gave the Commission authority to prescribe an intrastate rail rate upon application of a railroad if the state had not acted within 120 days of receiving a request by a railroad to change the rate (§ 210, 90 Stat. 46). Congress later determined that the 4R Act "ha[d] not provided the flexibility in rates that the industry need[ed] to earn revenues sufficient to maintain and improve the rail system" (H.R. Rep. 96-1035, 96th Cong., 2d Sess. 38 (1980)).

[3] In addition to the bankruptcies of eleven major railroads, including Penn Central (see H.R. Rep. 96-1035, 96th Cong., 2d Sess. 99 (1980)), there were other pervasive signs of difficulty. By 1980, almost two thirds of all intercity freight was transported by methods other than rail. See 49 U.S.C. 10101a note; H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 79 (1980). Earnings of railroads were lower than those of any other mode of transportation and were not sufficient to provide funding of essential capital improvements. See 49 U.S.C. 10101a note; H.R. Conf. Rep. 96-1430, *supra*, at 79.

> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> (2) to minimize the need for Federal regulatory control over the rail transportation system * * *;
>
> * * * *
>
> (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
>
> * * * *
>
> (9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle.

To achieve these elements of national policy, the Staggers Act changed the regulation of interstate railroads in two ways that together form the statutory foundation of this case.

First, the Staggers Act gives the Interstate Commerce Commission broad authority to exempt rail carriers, or specified transactions or classes of service, from regulation. 49 U.S.C. 10505; see H.R. Rep. 96-1035, *supra*, at 60. The Commission is directed to grant an exemption whenever it finds that further regulation is not necessary to carry out national policy or to protect shippers. 49 U.S.C. 10505(a) provides as follows:

> (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

In addition to this general exemption authority, the Staggers Act specifically provides (49 U.S.C. 10505 (f)) that "[t]he Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement." In granting the Commission broad exemption authority, Congress specifically recognized that the Commission was the appropriate body to determine whether an exemption was warranted. As the Conference report indicated (H.R. Conf. Rep. 96-1430, *supra*, at 105):

> The policy underlying [the exemption] provision is that while Congress has been able to identify broad areas of commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress.

Second, the Staggers Act severely circumscribed the power of the states to regulate "in*tra*state transportation provided by a[n interstate] rail carrier" (emphasis added) subject to the jurisdiction of the Commission.[4] 49 U.S.C. 11501 provides, inter alia, as follows:

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[4] The federal government's constitutional power to regulate intrastate transportation by interstate railroads is well estab-

(b)(1) A State authority may only exercise jurisdiction over intrastate transportation provided by a[n interstate] rail carrier * * * if such State authority exercises such jurisdiction exclusively in accordance with the provisions of this subtitle.

(2) Within 120 days after the effective date of the Staggers Rail Act of 1980, each State authority exercising jurisdiction over intrastate rates, classifications, rules, and practices for intrastate transportation described in paragraph (1) of this subsection shall submit to the Commission the standards and procedures (including timing requirements) used by such State authority in exercising such jurisdiction.

(3)(A) Within 90 days after receipt of the intrastate regulatory rate standards and procedures of a State authority under paragraph (2) of this subsection, the Commission shall certify such State authority for purposes of this subsection if the Commission determines that such standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission under this title. If the Commission determines that such standards and procedures are not in such accordance, it shall deny certification to such State authority * * *.

* * * * *

(4)(A) * * * Any State authority which is denied certification [by the Commission] or

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lished and is not at issue in this case. "The federal government has long regulated intrastate rail traffic on the theory that such traffic is part of an interstate rail network and can sufficiently affect interstate commerce to permit regulation under the commerce clause * * *." *Illinois Commerce Comm'n* v. *ICC*, 749 F.2d at 877 (citing *Houston & Tex. R.R.* v. *United States (Shreveport Rate Case)*, 234 U.S. 342, 350-353 (1914)).

> which does not seek certification may not exercise any jurisdiction over intrastate rates, classifications, rules, and practices * * *.
>
> (B) Any intrastate transportation provided by a rail carrier in a State which may not exercise jurisdiction over an intrastate rate, classification, rule, or practice of that carrier due to a denial of certification under this subsection shall be deemed to be transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.
>
> * * * * *
>
> (c) Any rail carrier providing transportation subject to the jurisdiction of the Commission * * * may petition the Commission to review the decision of any State authority, in any administrative proceeding in which the lawfulness of an intrastate rate, classification, rule, or practice is determined, on the grounds that the standards and procedures applied by the State were not in accordance with the provisions of this subtitle. * * * If the Commission determines that the standards and procedures were not in accordance with the provisions of this subtitle, its order shall determine and authorize the carrier to establish the appropriate rate, classification, rule, or practice.

In summary, a state authority may exercise jurisdiction over "intrastate transportation provided by [an interstate] rail carrier"[5] only in accordance with the Interstate Commerce Act and the Staggers Act (Paragraph (b)(1)). A state authority is re-

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[5] This phrase "an interstate rail carrier" is a shorthand phrase for "a rail carrier providing transportation subject to the jurisdiction of the Commission [under 49 U.S.C. 10501 (a)]" (49 U.S.C. 11501(b)(1)).

quired to submit its standards and procedures to the Commission in order to obtain certification (Paragraph (b)(2)), and it may not regulate intrastate transportation provided by an interstate rail carrier at all if it is denied certification by the Commission (Paragraph (4)(A)). It is permitted to regulate intrastate transportation provided by an interstate rail carrier if it has submitted its standards and procedures to the Commission and the Commission, having first determined that "such [state] standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission,"[6] has certified the state authority (Paragraphs (3)(A) and (4)(A)). Even after certification, however, the Commission may review, upon petition by a carrier, the determination of a state authority in any state administrative proceeding in which the lawfulness of an intrastate rate, classification, rule, or practice is determined, to ascertain whether the standards and procedures applied by the state are in accordance with federal law (Subsection (c)). The Commission is itself directed to determine the appropriate rate, classification, rule, or practice if it determines that such standards and procedures are not in accordance with federal law (*ibid.*). Finally, the Staggers Act provides that intrastate transportation provided by a rail carrier in any state that has not been certified "shall be deemed to be transportation subject to the jurisdiction of the

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[6] Several courts of appeals have held that the phrase "standards and procedures" refers not only to statutory provisions but also includes standards and procedures set forth in regulations, rulings, and decisions of the Commission. See *Railroad Comm'n of Texas* v. *United States*, 765 F.2d 221, 232 (D.C. Cir. 1985), and the cases cited therein.

Commission" (49 U.S.C. 11501(b)(4)(B); see generally *Aluminum Co. of America* v. *United States*, 790 F.2d 938, 939 (D.C. Cir. 1986); 49 U.S.C. 10501 (c) and (d)).

The Staggers Act thus implements a major shift from state to federal regulatory control over intrastate transportation of interstate rail carriers. As the Fifth Circuit has stated, "the [Staggers] Act is in nature a preemptive statute. If a state wishes to continue regulating, it must do so in accordance with federal policy." *Texas* v. *United States*, 730 F.2d 339, 347 (5th Cir.), cert. denied, 469 U.S. 892 (1984). See also *Illinois Commerce Comm'n* v. *ICC*, 749 F.2d at 878; *Utah Power & Light Co.* v. *ICC*, 747 F.2d 721, 736 n.19 (D.C. Cir. 1984), on reh'g, 764 F.2d 865 (D.C. Cir. 1985); H.R. Conf. Rep. 96-1430, *supra*, at 83 ("State authority over intrastate [rail] transportation is limited to administering the provisions of the Interstate Commerce Act.").

B. The Plan II TOFC/COFC Exemption

In 1981, in its first action pursuant to its new exemption authority, the Commission adopted a new regulation (49 C.F.R. 1039.13) exempting what for convenience may be referred to as "Plan II" trailer-on-flatcar (TOFC) and contained-on-flatcar (COFC) service.[7] See *Improvement of TOFC/COFC Regula-*

[7] TOFC/COFC traffic, also known as "piggybacking," involves the transportation of trailers or containers on flatcars between points connected by rails; the goods are carried over the road, from or to points not connected by rail, in the same trailers or containers, and hauled (in "Plan II" service) by the railroad itself. When goods are to be delivered from or to a place not accessible by rail, TOFC/COFC eliminates the need to transfer the goods between rail car and truck. TOFC/COFC service provides flexibility for railroads by enabling them to serve areas beyond their tracks. See generally

tion, 364 I.C.C. 731 (1981); see also 364 I.C.C. 391 (1980) (notice of proposed TOFC/COFC exemption). The Commission described the exempted class of service more particularly as "railroad operations involving TOFC and COFC * * * conducted on railroad flatcars or in trucks that are owned and operated by the railroad itself (rather than by a separately incorporated railroad affiliate)." 364 I.C.C. at 733. By its terms, the Commission's exemption of Plan II TOFC and COFC service applies to both the rail portion and the motor portion of the service (*ibid.*; 49 C.F.R. 1039.13).[8]

D. Harper, *Transportation in America: Users, Carriers, Government* 541-543 (1978); R. Lieb, *Transportation: The Domestic System* 41 (2d ed. 1981).

The term "Plan II" service was used by the Commission in *Ex Parte 230, Substituted Service-Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301, 305 (1964). In that proceeding, the Commission identified five distinct forms of TOFC/COFC Service (*id.* at 304-305, 309-312). Plan II service was described as follows (*id.* at 305):

> Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of truckers.

In *American Trucking Ass'ns* v. *Atchison, T. & S.F. R.R.*, 387 U.S. 397 (1967), this Court affirmed the Commission's rule, adopted in *Ex Parte 230*, that railroads offering TOFC service must make that service available to motor and water carriers at the same rate as to the public. The Court in *American Trucking* also described the five TOFC/COFC plans set forth in *Ex Parte 230* (387 U.S. at 403, quoting 322 I.C.C. at 304-305). See pages 29-30, *infra*.

[8] The exemption also governs the *rail* portion of other TOFC plans where the rail carrier provides the rail service but a separate carrier, such as a trucking company, provides the other portion of the service. See 364 I.C.C. at 733-734; 49 C.F.R. 1039.13.

The Commission based its TOFC/COFC exemption both on its general exemption power under the Staggers Act (49 U.S.C. 10505(a)) and on 49 U.S.C. 10505(f), which authorizes the Commission to exempt "transportation that is provided by a rail carrier as a part of a continuous intermodal movement." In promulgating the exemption, the Commission found, pursuant to 49 U.S.C. 10505(a)(2)(B), that "the potential for railroad abuses of market power in TOFC/COFC service is virtually nonexistent" (364 I.C.C. at 393). It further concluded (*id.* at 395) that as a result of the exemption, "[r]ailroads will be able to offer a complete intermodal service without regulatory restraints."

The Commission's exemption of Plan II TOFC/COFC service was challenged in the Fifth Circuit on the ground, inter alia, that the Commission's exemption authority did not extend to motor carriage but applied only to rail carriage. The Fifth Circuit upheld the Commission's TOFC exemption in all relevant respects. *American Trucking Ass'ns* v. *ICC (ATA)*, 656 F.2d 1115 (1981). In particular, the court rejected the contention that the Commission's exemption authority did not reach the over-the-road portion of TOFC/COFC service. In the court's words (656 F.2d at 1120 (citation and footnote omitted)):

> [R]ail-owned truck TOFC/COFC service is "transportation that is provided by a rail carrier." Had Congress intended to limit the Commission's exemption authority to rail transportation, it could easily have done so by using that language. Instead, it chose the broad "transportation-that-is-provided-by-a-rail-carrier" language and presumably did so with knowledge

> that it previously had defined "transportation" to include the movement of passengers or property by motor vehicle.

The court stressed the fact that under the TOFC/COFC service at issue, the railroads were providing and operating their own trucks (*id.* at 1121).

C. The Present Dispute

After the enactment of the Staggers Act, Texas, along with most other states, applied to the ICC for certification to regulate intrastate rail transportation, and from April 17, 1981, until May 20, 1984, the Railroad Commission of Texas (RCT) operated under a provisional certification.[9] During the period of

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[9] Under the Staggers Act, as noted above (pages 6-9), states seeking to continue playing a regulatory role with respect to intrastate transportation provided by an interstate rail carrier were required to submit their standards and procedures to the Commission within 120 days of the enactment of the Act. 49 U.S.C. 11501(b)(2). The Commission was directed by Congress to deny certification to states whose standards and procedures did not comply with federal law. As of January 1981, 40 states, including Texas, had applied for certification. See *Ex Parte No. 388, State Intrastate Rail Rate Authority—Pub. L. 96-448*, 364 I.C.C. 881, 882, 885 (1981). The Commission found (*id.* at 882), however, that the states' applications were incomplete. Instead of denying certification, the Commission, on April 17, 1981, gave each of the 40 states provisional certification. See generally *Railroad Comm'n of Texas* v. *United States*, 765 F.2d 221, 224-226 (D.C. Cir. 1985). The states were therefore permitted to continue regulating intrastate transportation provided by an interstate rail carrier, pursuant to federal standards (and subject to the Commission's authority (49 U.S.C. 11501(c)) to review and set aside state actions not in accordance with federal law). The Commission's decision granting states conditional

Texas' provisional certification under Section 11501 (b) to regulate intrastate rail service, some forty decisions by RCT rejecting contracts between railroads and shippers were appealed to, and reversed by, the Commission. See *Railroad Comm'n of Texas* v. *United States*, 765 F.2d 221, 224-225 & n.1 (D.C. Cir. 1985) (citing examples). In many of its rulings, the Commission warned RCT that it was not complying with federal standards. See *id.* at 225.

In April 1984, the Commission reviewed Texas' final submission. The Commission ruled that Texas did not qualify for final certification and terminated its provisional certification as well. *State Intrastate Rail Authority—Texas*, 1 I.C.C.2d 26 (1984). That decision by the Commission, which became effective on May 20, 1984 (see 49 Fed. Reg. 17106), was upheld by the District of Columbia Circuit, *Railroad Comm'n of Texas* v. *United States*, *supra*, and Texas did not seek review of that decision in this Court. Accordingly, under 49 U.S.C. 11501(b)(4)(A) and (B), Texas may not now exercise any jurisdiction over intrastate rates, classifications, rules and practices of railroads subject to the jurisdiction of the Commission.

During the period in which it was operating under provisional certification, RCT issued the two orders involved in the present case (J.A. 22-23, 35-36). In both orders RCT exempted the rail portion of in-

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certification was upheld in *Illinois Central Gulf R.R.* v. *ICC*, 720 F.2d 958 (7th Cir. 1983). Revised certification requests were filed by 36 states, including Texas. These new submissions were still deemed inadequate, however, and the Commission, in January 1982, extended those states' provisional certification. See *id.* at 959.

trastate TOFC/COFC service from regulation but refused to exempt the motor portion of that same service (J.A. 23, 36).

The first RCT order involved petitioner Missouri-Kansas-Texas Railroad Co. (MKT), which had applied to RCT for exemption from regulation of its intrastate TOFC/COFC traffic to the same extent that the Commission's 1981 regulation had exempted Plan II TOFC/COFC traffic. An RCT hearing examiner issued a proposed decision in the MKT case on October 19, 1983 (J.A. 11-21).[10] On December 5, 1983, RCT issued an order adopting the hearing examiner's recommendation (J.A. 22-23). Under RCT's ruling, the rail portion of MKT's intrastate TOFC/COFC operations was exempted, but its "incidental pre-rail and ex-rail over-the-road movements" were not exempted (J.A. 23).

MKT and various intervenor rail carriers appealed RCT's decision to the Commission, pursuant to 49 U.S.C. 11501(c), contending that RCT's refusal to extend the intrastate exemption to cover the motor portion of TOFC/COFC service, in trucks owned and operated by the railroads as part of a continuous intermodal movement, was contrary to federal standards. The Commission agreed with MKT. In a decision rendered in January 1984 (Pet. App. 16a-23a), the Commission ruled that its 1981 TOFC/COFC regulation had exempted not only the rail por-

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[10] The evidence at the hearing revealed that MKT averaged about 92 TOFC/COFC shipments per month within Texas intrastate commerce and planned to double that traffic within three years if RCT granted an exemption (J.A. 14). Various rail carriers that had intervened in MKT's proceeding also planned to engage in Texas intrastate TOFC/COFC activity if the exemption were granted (*ibid.*).

tion but also the motor portion of TOFC/COFC service, where the motor portion is provided by interstate rail carriers in their own trucks, and directed RCT (under 49 U.S.C. 11501(c)) to exempt the motor portion as well.

The second RCT order involved in this case dealt with Road-Rail Transportation Company, Inc. (Road-Rail), which had applied to RCT for exemption from regulation for its "roadrailer" equipment.[11] On January 17, 1984, an RCT hearing examiner issued a proposed ruling (J.A. 24-34) recommending that Road-Rail's application be granted as to rail movement but denied as to highway movement (J.A. 32, 34). Notwithstanding the Commission's intervening decision in January 1984 in the MKT case (Pet. App. 16a-23a), RCT, on February 28, 1984, adopted the hearing examiner's recommendation (J.A. 35-36). Road-Rail appealed to the Commission pursuant to 49 U.S.C. 11501(c); the Commission reversed, stating (Pet. App. 27a-28a (footnote omitted)):

> In a decision served January 23, 1984, we determined that the entire TOFC/COFC exemption is in effect in the State of Texas * * *. Thus, the failure of RCT to recognize an exemption for all of Road-Rail's intermodal rail and highway operations within Texas is a clear violation of Federal standards.
>
> * * * * *
>
> Under 49 U.S.C. 11501(c), we find that the RCT's refusal to accord Road-Rail the benefits of the entire exemption approved by us in TOFC/COFC violated Federal standards and

[11] Roadrailers are "specially designed carriage vehicles which will operate in a rail mode or a highway mode" (J.A. 26).

procedures binding upon RCT in its regulation of intrastate commerce.[12]

The State of Texas sought review of the Commission's decisions in the MKT and Road-Rail cases in the Fifth Circuit.[13] The Fifth Circuit reversed the Commission in both cases. The court's decision was based (Pet. App. 4a) primarily on 49 U.S.C. 10521 (b)(1), a provision of the Motor Carrier Act of 1935, ch. 498, 49 Stat. 543, as amended, 49 U.S.C. 10101 *et seq.* (the Motor Carrier Act), which provides, with certain exceptions not applicable here, that nothing in Subtitle IV of Title 49 (which codifies the Interstate Commerce Act, the Motor Carrier Act, the Staggers Act and other laws) "affects the power of a State to regulate intrastate transportation provided by a motor carrier." 49 U.S.C. 10521 (b)(1). The court stated that 49 U.S.C. 10521(b)(1) contains no exception for "intrastate trucking by intrastate rail carriers in an intermodal setting" (Pet. App. 7a). Apparently assuming that rail carriers become "motor carriers" for the motor portion of

[12] The Commission did not comment directly upon the various specific types of services that Road-Rail proposed to perform in Texas (see J.A. 26 (describing proposed services)), since the only issue before it was whether its 1981 exemption of Plan II TOFC/COFC service applied to intrastate transportation of interstate rail carriers. The Commission did note (Pet. App. 27a), however, that it had previously found Road-Rail to be a rail carrier subject to its jurisdiction. Road-Rail is not a petitioner in this proceeding, and we are advised by counsel for Road-Rail that the company has been reorganized in bankruptcy and no longer performs rail carriage service but merely sells and leases its roadrailer equipment.

[13] The two cases were consolidated in the Fifth Circuit for purposes of argument (J.A. 3, 6).

Plan II TOFC/COFC service, the court concluded that the states retain exclusive jurisdiction over the motor portion of intrastate TOFC/COFC service (Pet. App. 5a, 7a). Without specifically discussing the fact that a prior Fifth Circuit panel had held in *ATA* that the phrase "transportation provided by a rail carrier" includes the motor portion of Plan II TOFC/COFC service (see pages 11-12, *supra*), the panel distinguished the *ATA* decision on the ground that both the rail and motor travel involved in *ATA* were interstate (Pet. App. 5a).

The court of appeals recognized that the Commission "has been given jurisdiction over intrastate rail traffic" (Pet. App. 6a) and that "[a] principal change occasioned by the Staggers Rail Act was the curtailment of the authority of the states to regulate that traffic" (*ibid.*). Nonetheless, the court stated that "to accept uncritically the I.C.C.'s argument that it can exempt intrastate trucking connected with intrastate rail travel from all regulation would be to court potential mischief" (*ibid.*). To exemplify what it deemed to be the "potential mischief" of the Commission's decision, the court gave the following hypothetical example (*id.* at 6a-7a):

> A small intrastate rail carrier could transport goods, in a trailer capable of TOFC movement, from the point of origination to its terminal, which might be close or at a distance. The trailer then could be loaded on a flatcar and moved by rail a few miles and thereafter continue its journey anywhere within the State of Texas, totally exempt from any motor carrier regulation. Extending the worst case scenario, one might envision a small intrastate railroad

which operates many trucks. A trailer load is picked up by truck at Orange, Texas and transported hundreds of miles to the intrastate rail carrier's terminal on the eastern fringe of San Antonio. There the trailer is placed on a flatcar and transported across the city to a terminal on the western edge of that city. At that point, the trailer is removed from the flatcar, attached to a cab (perhaps the same one), and driven additional hundreds of miles across Texas highways to El Paso. That movement of goods would involve transportation by motor carrier across the entire State of Texas, except for the few miles across the city of San Antonio, but be completely free of regulation by state authorities.

The court concluded that "intrastate transportation by a motor carrier, even if done in conjunction with a measure of intrastate rail transportation in the TOFC/COFC intermodal setting, is subject to regulation by the states" (*id.* at 7a). A petition for rehearing en banc was subsequently denied (*id.* at 12a-13a).

SUMMARY OF ARGUMENT

This case presents two issues of statutory interpretation. The first is whether the motor portion of intrastate Plan II TOFC/COFC service (*i.e.*, TOFC/COFC service "conducted on railroad flatcars or in trucks that are owned and operated by the railroad itself") is "intrastate transportation provided by a rail carrier" within the meaning of the Staggers Act, 49 U.S.C. 11501, and hence subject to the jurisdiction of the Commission. The second is whether, even if so, the motor portion of such service is nevertheless "intrastate transportation provided by a motor carrier" within the meaning of the Motor Car-

rier Act, 49 U.S.C. 10521(b)(1), and hence subject to state regulation.

If, as we contend, the motor portion of Plan II TOFC/COFC service is "transportation provided by a rail carrier" and is *not* "transportation provided by a motor carrier," then the State of Texas is barred from regulating the motor portion for two separate reasons. First, in the proceeding under review, the Commission determined that the standards and procedures applied by the state in determining to regulate the motor portion were not in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission, which has determined to exempt all Plan II TOFC/COFC service, including the motor portion. See 49 U.S.C. 11501(c). Second, in a decision not now under review or subject to further review, the Commission denied Texas' request for certification under 49 U.S.C. 11501(b) to regulate intrastate transportation provided by rail carriers, on the ground that the standards and procedures submitted by Texas with that request were not in accordance with federal standards and procedures; as a result, Texas may not regulate *any* "intrastate transportation provided by a[n interstate] rail carrier."

The motor portion of Plan II TOFC/COFC service is "transportation provided by a rail carrier." The Fifth Circuit so ruled in *ATA* and did not question that conclusion in this case. Nor has any case held otherwise. The Fifth Circuit's *ATA* ruling rests on the fact that the over-the-road portion of the service in question is provided by the rail carrier using its own trucks; on the language of the statute, which defines "transportation" broadly to include over-the-road transport; and on Congress' decision not to use

a term such as "transport by rail" but instead to use the term "transportation provided by a rail carrier," thereby indicating its intention to include all such transportation.

The motor portion of Plan II TOFC/COFC service is not "transportation provided by a motor carrier" because, while it is "transportation," the railroad does not become a "motor carrier" merely by providing Plan II TOFC/COFC service. Again, the statute itself is dispositive: the term "motor carrier" is a defined term that does not include a carrier that offers motor transportation only as a part of Plan II TOFC/COFC service. The Fifth Circuit's assumption, stated without analysis or citation, that the railroad automatically becomes a "motor carrier" when it provides the motor portion of Plan II TOFC/COFC service, is erroneous.

The Commission's determination that the motor portion of Plan II TOFC/COFC service is "transportation provided by a rail carrier" and not "transportation provided by a motor carrier" is in accordance not only with the language of both the Staggers Act and the Motor Carrier Act but also with Congress' legislative objectives. Under the Fifth Circuit's ruling, if a railroad provides interstate TOFC/COFC service, with railroad-owned trucks providing ancillary pickup and delivery service by hauling the trailers/containers to and from rail points, (i) the railroad is exempt (by virtue of the Commission's 1981 regulation) from any federal or state economic regulation of any portion of the journey with respect to any shipment that crosses a state line, but (ii) with respect to any shipment (even if carried on the same train) that does not cross a state line, the railroad is exempt only with respect to the rail portion

of the transportation and not the motor portion. That result would frustrate Congress' effort in the Staggers Act to achieve reduced and more rational regulation of railroads in general and of intermodal transportation in particular.

ARGUMENT

THE COMMISSION HAS AUTHORITY TO REQUIRE THE STATES TO EXEMPT BOTH THE RAIL PORTION AND THE MOTOR PORTION OF INTRASTATE PLAN II TOFC/COFC SERVICE PROVIDED BY INTERSTATE RAIL CARRIERS

A. Under The Plain Language Of The Interstate Commerce Act, As Amended By The Staggers Act, The Motor Portion Of Plan II TOFC/COFC Service Is "Transportation Provided By A Rail Carrier"

The starting point for interpreting a statute is the language itself: "If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 6 (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984)).

The Staggers Act provisions that confer broad exemption authority on the Commission (49 U.S.C. 10505(a) and (f)) and narrowly circumscribe the power of states to regulate intrastate transportation provided by interstate rail carriers (49 U.S.C. 11501 (b) and (c)) repeatedly and consistently use the term "transportation provided by a rail carrier." *E.g.*, 49 U.S.C. 11501(b)(1); 49 U.S.C. 11501(b)(4)(B); 49 U.S.C. 10505(f). By using the broad term "transportation provided by a rail carrier" rather than, for example, "transport by rail," Con-

gress made clear that it intended to refer to all transportation provided by rail carriers subject to the Commission's jurisdiction, not merely to rail transportation. The applicable definition of "transportation" is contained in 49 U.S.C. 10102(25); that definition is not limited to rail movement but includes, inter alia, movement by motor vehicle.[14] Thus, by the terms of Sections 10505 and 11501, the Commission has authority not only over intrastate rail movements of an interstate rail carrier, but also over other forms of transportation, where such other forms of transportation are "provided by" the rail carrier.

In the general exemption provision of the Staggers Act, 49 U.S.C. 10505(a), the Commission's authority to exempt persons, transactions, or services from regulation extends to "matter[s] related to a[n interstate] rail carrier *providing transportation*" (49 U.S.C. 10505(a) (emphasis added)). And in 49 U.S.C. 10505(f), Congress again used broad language in explicitly recognizing that the Commission's exemption authority extends to intermodal transportation:

> The Commission may exercise its authority under this section to exempt *transportation that is pro-*

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[14] "Transportation" is defined to include (49 U.S.C. 10102(25)):

> (A) a locomotive, car, vehicle, motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and
>
> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

vided by a rail carrier as a part of a continuous intermodal movement. [Emphasis added.]

In *ATA*, the Fifth Circuit had before it a challenge to the Commission's 1981 regulation exempting, pursuant to Section 10505, both the rail portion and the motor portion of Plan II TOFC/COFC service. The challengers in that case alleged that the phrase "transportation provided by a rail carrier" encompassed only the rail portion and not the motor portion of such service. The court noted that, under the TOFC/COFC service in question, the railroads provided the motor portion themselves, using their own trucks. 656 F.2d at 1121. Finding the literal meaning of the statute controlling, the court ruled that the Commission's authority to exempt Plan II TOFC/COFC service from regulation under 49 U.S.C. 10505 extended not only to the rail portion but to the motor portion as well. The court's reasoning bears quoting at length (656 F.2d at 1120-1121 (footnote omitted) (emphasis added)):

> [R]ail-owned truck TOFC/COFC service is "transportation that is provided by a rail carrier." *Had Congress intended to limit the Commission's exemption authority to rail transportation, it could easily have done so by using that language. Instead, it chose the broad "transportation-that-is-provided-by-a-rail-carrier" language* and presumably did so with knowledge that it previously had defined "transportation" to include the movement of passengers or property by motor vehicle. 49 U.S.C. § 10102(24).
>
> More important, the source of the Commission's authority to grant exemptions is found in section 10505(a) and not in section 10505(f), which simply singles out continuous intermodal

> movement as an appropriate candidate for the exercise of the Commission's section 10505(a) exemption authority. Section 10505(a) authorizes the Commission to grant an exemption "[i]n a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter" when certain findings are made. *Again we note that Congress has chosen not to define narrowly the Commission's exemption authority but instead has extended that authority to "matter[s] related to a rail carrier providing transportation * * *." We find that transportation of TOFC/COFC traffic by rail-owned trucks is a "matter related to a rail carrier providing transportation" within the meaning of section 10505(a).*

The court further noted (656 F.2d at 1121 (footnote omitted)) that the challengers had failed to explain "what other, more narrowly circumscribed matters Congress could have had in mind when it enacted section 10505(a)." Accord, *Hansen* v. *Norfolk & W.R.R.*, 689 F.2d 707, 712 (7th Cir. 1982) (noting with approval the Commission's exemption of both the truck portion and the rail portion of railroad-provided TOFC service).[15]

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[15] The conclusion that Congress intended the phrase "transportation provided by a rail carrier" to be broader than "rail transportation" or "rail traffic" is evident in at least one pre-Staggers Act provision of the ICA, 49 U.S.C. 10523(a)(1)(B)(i). That section provides that the Commission has no jurisdiction under subchapter II (the motor carrier subchapter) "over transportation by motor vehicle provided in a terminal area when the transportation * * * is *provided by* * * * a rail carrier subject to the jurisdiction of the Commis-

In the present case, the Fifth Circuit had before it the question whether the phrase "intrastate transportation provided by a[n interstate] rail carrier"—which appears in Section 11501 where it defines the activity over which state authority is narrowly circumscribed—reaches only the rail portion of intrastate Plan II TOFC/COFC service or reaches both the rail and motor portions. Although the opinion is not perfectly clear on this point, the court does *not* seem to have departed from the logic of the prior Fifth Circuit decision in *ATA*.[16] To the contrary,

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sion * * *" (emphasis added). See also 49 U.S.C. 10523(a)(1)(B)(ii), (iii) (similar provision with respect to motor vehicle service in a terminal area "provided by" water carrier or freight forwarder). This use of the phrase "transportation * * * provided by * * * a rail carrier" in 49 U.S.C. 10523(a)(1)(B)(i) refers, by its terms, to "*motor* * * * transportation * * * provided by * * * a rail carrier" (emphasis added). Like the statutory provisions involved in the present case, 49 U.S.C. 10523(a)(1)(B)(i) demonstrates that when Congress is referring to some mode other than, or in addition to, rail transportation, it does so by using the phrase "transportation provided by a rail carrier."

[16] The court below twice misstated the Commission's jurisdiction over railroads. At one point, the court said that for the Commission to have jurisdiction "the *transportation* must originate in or traverse a sister state or foreign country" (Pet. App. 4a (emphasis added)). Later, the court described, as an example of the "mischief" supposedly possible as a result of the Commission's order, a "small *intrastate* rail carrier" (Pet. App. 6a (emphasis added)) gaining an exemption for motor carriage by having the goods "moved by rail a few miles." *Ibid.* Both statements are wrong. The Commission's jurisdiction over rail carriers extends to *carriers* providing interstate transportation (see 49 U.S.C. 10501) and the Staggers Act and the Commission's jurisdiction plainly reach intrastate transportation provided by such a carrier, 49 U.S.C. 11501, but they do not reach wholly intrastate carriers. The

the court appears to have assumed that the phrase "transportation provided by a rail carrier," which appears in both Section 11501 and Section 10505, means the same thing in both contexts and is broad enough in both contexts to cover the motor portion of Plan II TOFC/COFC service. That conclusion follows from the language of the statute and the Fifth Circuit's broader ruling in *ATA*; moreover, no court has held to the contrary.

B. The Motor Portion Of Plan II TOFC/COFC Service Is Not "Transportation Provided By A Motor Carrier"

The jurisdictional section of the Motor Carrier Act, 49 U.S.C. 10521(b)(1),[17] provides that, with certain exceptions not applicable here, subtitle IV of Title 49, which contains all the statutes at issue in this case, "does not * * * affect the power of a State to regulate intrastate transportation provided by a motor carrier." The court below appears to have concluded that although the motor portion of Plan II TOFC/COFC is "transportation provided by a rail carrier" within the meaning of 49 U.S.C. 11501, it is also "transportation provided by a motor carrier" within the meaning of 49 U.S.C. 10521(b)(1) and is therefore, if conducted intrastate, subject to state

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court's example of supposed "mischief" is discussed below at pages 35-36.

[17] The Motor Carrier Act of 1935 implemented federal regulation of motor carriers. In 1980, Congress passed the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. 49 U.S.C. 10101 *et seq.* That legislation provides, inter alia, for greater service and price competition among carriers, rate flexibility, and eased entry standards. In enacting the Motor Carrier Act of 1980, Congress sought to reduce unnecessary regulation in the motor carrier industry. See H.R. Rep. 96-1069, 96th Cong., 2d Sess. 3, 10 (1980).

regulation.[18] The court assumed that because the railroad petitioners in this case were providing motor service as part of their Plan II TOFC/COFC service, they automatically became "motor carriers" as to the motor segment of the journey. It then reasoned that, under 49 U.S.C. 10521(b)(1), the State of Texas retained jurisdiction over the motor portion of the intrastate Plan II TOFC/COFC transportation provided by the railroad petitioners (Pet. App. 4a, 7a). The court distinguished *ATA* on the ground that in *ATA*, the "rail travel" and "motor carrier travel" were both "interstate" (Pet. App. 5a).

The court below erred in ruling, on the basis of no legal authority, that the motor portion of Plan II TOFC/COFC service is "transportation provided by a motor carrier." The service is, of course, "transportation," but the rail carriers providing it do not become "motor carriers" by virtue of providing motor service as part of Plan II TOFC/COFC service. In the first place, the railroads do not fit the statutory definition of "motor carrier," the pertinent part of which contemplates a person offering the public motor service over one or more routes and being compensated for *that* carriage, not a railroad offering, on a single tariff, rail transportation supplemented by motor transportation provided by the railroad itself using its own trucks.[19] In the performance of Plan

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[18] The court of appeals did not expressly consider (1) whether the same transportation can be both "provided by a rail carrier" and "provided by a motor carrier" or (2) how, in such a case, the conflict between the curtailment of state jurisdiction in Section 11501 and the broad preservation of state power in Section 10521 would be resolved.

[19] 49 U.S.C. 10102(12) provides that the term "motor carrier" "means a motor common carrier and a motor contract

II TOFC/COFC service, in which the rail carriers own and operate the trucks involved, the railroads

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carrier." "Motor common carrier" and "motor contract carrier" are defined as follows (49 U.S.C. 10102):

> (13) "motor common carrier" means a person holding itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes, or both.
>
> (14) "motor contract carrier" means—
>
> (A) a person, other than a motor common carrier, providing motor vehicle transportation of passengers for compensation under continuing agreements with a person or a limited number of persons—
>
> (i) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or
>
> (ii) designed to meet the distinct needs of each such person; and
>
> (B) a person providing motor vehicle transportation of property for compensation under continuing agreements with one or more persons—
>
> (i) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or
>
> (ii) designed to meet the distinct needs of each such person.

The court below did not cite the statutory definition of "motor carrier" but simply assumed that anyone who provides truck service is automatically a motor carrier. The activity exempted by the Commission's 1981 regulation and by the rulings in this case plainly does not bring a person within the definition of "motor contract carrier." Nor does it bring a person within definition of "motor common carrier"—a person engaging in Plan II TOFC/COFC service does not hold itself out as offering, and does not publish any tariff relating to, motor vehicle transportation over regular or irregular routes. Rather, it offers transportation by rail in which (as an inseparable part of a single tariff) the motor portion is included.

do not offer motor vehicle transportation as such over any route, and they therefore do not become motor carriers. As the Fifth Circuit recognized in *ATA* (656 F.2d at 1121): "[T]he transportation of TOFC/COFC traffic in trucks owned and operated by railroads is closely related to railroads providing rail transportation * * *."

It has been implicit in Commission regulatory decisions since at least 1964 that intermodal service may be "provided by a rail carrier" or "provided by a motor carrier" without a rail carrier becoming a motor carrier, or vice versa.[20] In *Ex Parte 230, Substituted Service-Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301, 304-305, 309-312 (1964), the Commission described five kinds of intermodal service. As later quoted by this Court in *American Trucking Ass'ns* v. *Atchison, T. & S.F. R.R.*, 387 U.S. 397, 403 (1967), the descriptions are as follows:

> Plan I (Joint Intermodal):
>
> Railroad movement of trailers or containers of motor common carriers, with the shipment moving on one bill of lading and billing being done by the trucker. Traffic moves under rates in regular motor carrier tariffs, and the railroad's compensation is arrived at by negotiation between the two carriers.

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[20] Even if the definition of "motor carrier" were ambiguous, the Commission's interpretation of the statute it is responsible for administering is entitled to judicial deference. See generally *United States* v. *Fulton*, No. 84-1725 (Apr. 7, 1986), slip op. 9; *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843-845 (1984), see also *United States* v. *Drum*, 368 U.S. 370, 386 (1962) (recognizing that a court should not substitute its judgment for that of the Commission on the issue of whether someone is a "contract carrier" or a "private carrier").

Plan II (All-Rail):

Door-to-door service performed by the railroad, which moves its own trailers or containers on flatcars under open tariffs usually similar to those of truckers.

Plan III (All-Rail):

Ramp-to-ramp rates to private shippers and freight forwarders, based on a flat open-tariff charge, regardless of the contents of trailers or containers, which are usually owned or leased by freight forwarders or shippers. No pick-up or delivery is performed by the railroad.

Plan IV (All-Rail):

Flat open-tariff charge for loaded- or empty-car movement, the railroad furnishing only power and rails. Shipper or forwarder furnishes a trailer or container-loaded flatcar, either owned or leased.

Plan V (Joint Intermodal):

Joint railroad-truck or other combination of coordinated service rates. Either mode may solicit traffic for through movement, and traffic moves on originating carrier's bill of lading.

The Commission elaborated on the nature of Plan II service as follows (322 I.C.C. at 311):

Under plan II, the railroad holds out to provide a complete door-to-door service under a single bill of lading. Neither the shipper nor the consignee intervenes in any way in the overall transportation activities or does anything beyond tendering the shipment to the railroad at origin or at the shipper's loading dock. The railroad assumes full responsibility in the following

> respects: providing the shipper with a trailer; moving the trailer to, and placing it at, the shipper's door for pickup; loading the freight into the trailer; moving the loaded trailer from the shipper's dock to the TOFC ramp, furnishing a tractor and driver; supplying the rail flatcar; placing and securing the trailer onto the flatcar; providing the line-haul transportation from origin ramp to destination ramp; unloading the trailer from the flatcar at destination; moving the loaded trailer from the destination ramp to consignee's store door, again furnishing a tractor and driver; unloading the freight from the trailer; and finally removing the empty trailer.

In describing which specific carrier is in fact "providing" the particular TOFC/COFC plan, the Commission explained (322 I.C.C. at 330 (emphasis added)):

> [A]ll three—rail carrier, motor carrier, and freight forwarder—are even today providing, through the use of piggyback, services which in physical characteristics are substantially similar. Any one of the three can offer a transportation service which includes door-to-door pickup and delivery, movement of loaded trailers between a shipper's premises and a rail yard, and line-haul transportation of the loaded trailers by rail. *The railroad does this under its plan II TOFC tariff*; the trucker does it under plan I, in which it is encouraged by the railroads * * *.

The Commission has thus since 1964 recognized that Plan II TOFC/COFC service is a service that is provided by a railroad, in contrast to Plan I service provided by a trucker. There is no evidence that Congress has disagree with the Commission's characteri-

zation or sought to separate the two parts of Plan II TOFC/COFC service for any regulatory purpose.[21]

This Court's decision in *Thomson* v. *United States*, 321 U.S. 19 (1944), is not to the contrary. In *Thomson*, the Court held that a railroad had "grandfather" rights to a certificate as a common carrier by motor vehicle where the facts showed that it had "supplemented its rail freight service by providing motor vehicle service between various freight stations on its rail lines" (*id.* at 20). Those motor vehicle routes were described as "parallel with and roughly adjacent to the railroad's lines" (*ibid.*). The trucks were supplied, pursuant to a contractual arrangement, by motor vehicle operators (*id.* at 21).

The service provided by the railroad in *Thomson* differed from what the Commission much later defined as "Plan II TOFC/COFC service" in a critical respect: truck service was not a part of a single intermodal service provided by a railroad; rather, the truck routes were parallel to the rail routes, so

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[21] In enacting amendments to the Motor Carrier Act, Congress considered a provision that would have exempted "transportation by motor vehicle incidental to movement by rail, including transportation of property by motor vehicle for any distance as part of a continuous movement which, prior or subsequent thereto, has been or will be transported by rail, or occasional transportation of property by motor vehicle in lieu of transportation by rail because of mechanical failure, accident, or other causes beyond the control of the carrier or shipper." 126 Cong. Rec. 7771 (1980). See *ATA*, 656 F.2d at 1121. This pre-Staggers Act proposal—which covered far more than the motor portion of Plan II TOFC service—was not enacted. During the debates, the following argument was made against the proposal: "The incidental to rail portion of the bill * * * creates a situation of half-regulated, half-unregulated transportation * * *." 126 Cong. Rec. 7825 (1980) (remarks of Sen. Cannon).

that the rail carrier could (at its option) carry a shipment from point to point entirely by truck, or could carry the shipment by rail on one leg of its journey and by motor on another, by physically transferring the cargo from a railroad car to an over-the-road container, or vice versa. In Plan II TOFC/COFC service the transportation is provided by motor to points not reached by the carrier's tracks, using trucks owned by the rail carriers themselves. Plan II TOFC/COFC service is a continuous intermodal system that does not require a motor carrier certificate.[22]

In sum, both the rail and motor portions of the Plan II TOFC/COFC service are "transportation provided by a rail carrier" and are not "transportation provided by a motor carrier." The court below erred in assuming that the interstate rail carriers providing such service are also motor carriers,[23] and there-

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[22] The Commission's petition for a writ of certiorari (at 13) characterized the *Thomson* case as recognizing that a "railroad may use trucks as part of a 'single complete freight transportation service to and from all points on its lines' without becoming a motor common carrier * * *." The Court's ruling in *Thomson* was that the railroad involved in that case was entitled to a motor carrier certificate. The point that was intended to be made in the petition is that in *Thomson* the Court did not adopt a per se rule that a provider of transportation automatically becomes a motor carrier when motor transportation is provided, regardless of the circumstances, but that the Court found the railroad to be entitled to a motor carrier certificate only after examining the entire factual setting (Pet. Reply Br. 2-3 n.2). The United States regrets any misunderstanding caused by the phrasing of the petition.

[23] Indeed, near the end of its opinion, the panel ignored the facts of the case, characterizing the issue as involving "intrastate transportation by a *motor carrier* * * * done in con-

fore erred in relying on a jurisdictional limitation that is applicable only to motor carriers.

C. The Commission's Interpretation Of The Statutes At Issue Furthers The Staggers Act's Purposes Of Eliminating Disparate Federal And State Standards And Of Relieving Railroads Of Burdensome Regulation

In addition to analyzing the language of the statute, this Court also determines congressional intent by " 'look[ing] to the provisions of the whole law, and to its object and policy.' " *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975) (citation omitted). As a related matter, "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (citing *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 542-543 (1940), and *Haggar Co.* v. *Helvering*, 308 U.S. 389, 394 (1940)). In the present case, the structure and purposes of the Staggers Act reveal that the Commission has properly construed the pertinent statutory provisions. The court of appeals' interpretation, by contrast, would lead to incongruous results that could not have been intended by Congress.

Congress narrowly circumscribed state regulation of intrastate transportation provided by an interstate rail carrier because it concluded that burdensome state regulatory policies had prevented intrastate rail traffic from paying its fair share of the cost of the national railroad system. H.R. Rep. 96-1035, *supra*, at 61. Moreover, state regulatory stand-

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junction with a *measure* of intrastate rail transportation in the TOFC/COFC intermodal setting" (Pet. App. 7a (emphasis added)).

ards and procedures differed substantially from each other and from those promulgated by the Commission. *Id.* at 128-130. The legislative history of the Staggers Act reveals that Congress sought to ensure that the goals of the Act not be undermined by conflicting and burdensome state regulation. As the Conference report indicated (H.R. Conf. Rep. 96-1430, *supra*, at 106):

> The conferees' intent is to ensure that the price and service flexibility and revenue adequacy goals of the [Staggers] Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals.

See generally *Public Service Co. of Indiana, Inc.* v. *ICC*, 749 F.2d 753, 761 (D.C. Cir. 1984), cert. denied, No. 84-1699 (Oct. 15, 1985); *Indianapolis Power & Light Co.* v. *ICC*, 687 F.2d 1098, 1100 (7th Cir. 1982).

The legislative history of the Staggers Act exemption provision (49 U.S.C. 10505) reveals that at the time the Staggers Act was under consideration, Congress knew that the Commission was already proposing to exempt TOFC/COFC transportation pursuant to the limited exemption provisions of the earlier Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 31 (see H.R. Rep. 96-1035, *supra*, at 60). In addition, 49 U.S.C. 10505(f) refers specifically to intermodal transportation as an appropriate area for exemption activity by the Commission.

The court of appeals in the present case premised its ruling largely on what it perceived was the "potential mischief" (Pet. App. 6a) of the Commission's position. The court posited a hypothetical fact situation (quoted on pages 17-18, *supra*) in which a "small

intrastate rail carrier" provides rail transportation of a loaded trailer for only a short distance and thereafter removes the trailer from the train, attaches it to a cab, and transports the trailer on the highway across virtually the entire State of Texas (Pet. App. 6a-7a). According to the court, under the Commission's position, the entire journey would "be completely free of regulation" (*id.* at 7a).[24] But there are two things wrong with this argument. First, the Commission has no jurisdiction over, and hence the Staggers Act (Section 11501) does not circumscribe a state's power to regulate, an *intrastate* railroad. See, *e.g.*, 49 U.S.C. 10501(a) and (b)(1), 11501(b)(1); *Magner-O'Hara Scenic R.R.* v. *ICC*, 692 F.2d 441 (6th Cir. 1982) (post-Staggers Act case holding intrastate scenic rail operation unconnected to the national rail system to be beyond Commission jurisdiction); cf. *Texas* v. *United States*, 730 F.2d at 357 (emphasis added) (indicating that the Staggers Act's pre-emptive scheme is addressed to "regulat[ion of] the intrastate rates of *interstate* railroads"). Second, the court's example posits a situation in which rail service is either incidental to motor carriage or a wholly unnecessary add-on; there is no reason to think either that this example is realistic or that the Commission could not recognize and deal with a subterfuge. The railroad petitioners involved in this case are sizable *interstate* rail carriers who perform bona fide TOFC/COFC service that includes carrying some shipments entirely within Texas (Pet. App. 16a, 24a n.1, 27a). The court's hypothetical example, therefore, simply has no bearing on this case.

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[24] There are various other places in which the court erroneously referred to the railroad petitioners as "intrastate rail carriers" (see Pet. App. 3a, 7a).

In fact, it is the court of appeals' decision that would lead to "mischief." By holding that the states retain jurisdiction over the motor portion of intrastate Plan II TOFC/COFC service provided by interstate rail carriers, the decision would frustrate the achievement, in one important area of rail service (Plan II TOFC/COFC), of the principal objectives of the Staggers Act—to reduce burdensome and unnecessary regulation and to eliminate disparate federal and state standards.

In enacting the Staggers Act, Congress explicitly sought to reduce the regulatory burden on railroads, thus enabling them to become more competitive. This objective is reflected in the congressional findings at the outset of the statute (49 U.S.C. 10101a note), in the statutory goals (*ibid.*), and in the National Rail Transportation Policy (49 U.S.C. 10101a(1) and (2)). Indeed, the legislative history of the Act reveals (H.R. Rep. 96-1035, *supra*, at 38) that the "inflexibility of existing regulation" was in Congress' view a "significant reason" for the poor financial condition of the railroads. Moreover, Congress was concerned not only about the federal regulatory burden but about regulation at the state level as well. As the House report notes (H.R. Rep. 96-1035, *supra*, at 128-130):

> In addition to the constraints imposed by Federal regulations, the rail industry is also faced with multiple and diverse regulations at the state level. * * * [The] fifty states have individual regulatory jurisdiction over railroads. * * * The scope of state regulation encompasses entry, operating authority, abandonment, rates, accounting, service safety, construction, security issues, mergers, acquisitions, insurance and re-

> porting. It should be noted that each of these areas is also regulated at the Federal level. * * * The constraints imposed by regulation have been considerable.

To deal with the problem of burdensome regulation, Congress gave the Commission broad exemption authority. 49 U.S.C. 10505; see H.R. Rep. 96-1035, *supra*, at 60. In so doing, Congress explicitly recognized that the Commission was already contemplating, pursuant to the 4R Act, exemption of TOFC/COFC service (*ibid.*) Referring to TOFC/COFC and to other exemption activity by the Commission, the House report indicated (*ibid.*):

> The [Interstate and Foreign Commerce] Committee has followed the Commission's exemptions closely and believes the Commission has proceeded on a sound basis given the existing statutory restrictions, easing unnecessary regulatory restraints and providing an improved competitive transportation environment.

See also *Brae Corp.* v. *United States*, 740 F.2d 1023, 1044 (D.C. Cir. 1984) (citing reference in House Report to TOFC exemption activity by the Commission), cert. denied, No. 84-550 (Apr. 29, 1985).[25]

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[25] Congress clearly had TOFC/COFC service in mind in enacting 49 U.S.C. 10505(f). That intent is clear from the explicit reference to TOFC/COFC in the legislative history of 49 U.S.C. 10505 (H.R. Rep. 96-1035, *supra*, at 60) and from the floor debate over subsection (f) in particular. See 126 Cong. Rec. 19397-19398 (1980) (remarks of Rep. Ertel). Representative Ertel characterized TOFC as "woefully underutilized" and as "the most familiar intermodal movement" (*id.* at 19397). He further indicated that "the regulatory structure has inhibited intermodal growth by isolating modes from one another" (*id.* at 19397-19398). We should note that

Furthermore, Congress explicitly granted the Commission authority to exempt "transportation that is provided by a rail carrier as a part of a continuous intermodal movement" (49 U.S.C. 10505(f)).[26]

The court of appeals' decision would undermine the exemption of Plan II TOFC/COFC service provided

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Representative Ertel made one reference to "exempt[ing] the rail portion of an intermodal freight movement" (*id.* at 19397). He was referring, however, to two-carrier intermodal arrangements involving railroads and "trucking companies, airlines, and barge companies wishing to cooperate with one another" (*id.* at 19398), rather than to Plan II TOFC/COFC service provided entirely by railroads.

It should also be underscored that the importance of intermodalism in general and TOFC in particular was emphasized repeatedly during the congressional hearings on the Staggers Act. See, *e.g.*, *Railroad Deregulation Act of 1979: Hearings on H.R. 4570 Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 92, 140, 267, 275 (1979); *Railroad Transportation Policy Act of 1979: Hearings on S.1946 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 2d Sess. 418 (1980); *Rail Deregulation: Market Dominance, Contract Rates and Exemptions: Joint Hearing on H.R. 4570 Before the Subcomm. on Economic Growth and Stabilization of the Joint Economic Comm. and the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 93, 122 (1979).

[26] Congress' intentions in passing the Staggers Act would not, of course, operate to amend the existing provisions of the Motor Carrier Act unless Congress implemented those intentions with appropriate statutory language. But no amendment was needed here: there is no authority suggesting that the definition of "motor carrier" reached, or that Congress ever believed that it might reach, a railroad providing Plan II TOFC/COFC service.

by interstate rail carriers by leaving the motor portion of such service subject to state control with respect to any shipment that does not cross a state line, even if it is carried on a train that does. As a result, interstate railroads would remain subject to burdensome state regulation [27] with respect to one portion of some shipments carried by a type of service—TOFC/COFC service—that Congress contemplated exempting from regulation (see H.R. Rep. 96-1035, *supra*, at 60).

Contrary to congressional intent (see 49 U.S.C. 10101a(9); H.R. Rep. 96-1035, *supra*, at 128-130) the decision below would subject interstate rail carriers providing Plan II TOFC service to disparate federal and state regulation. As to shippers whose goods move interstate, the railroads will be entirely exempt from regulation; but the same railroads, when they provide the same Plan II service to shippers moving goods between points within a single state (even on the same interstate trains) will be subject to state regulation with respect to the motor portion of that service. Indeed, the reasoning of the panel's opinion would also seem to apply even if the rail portion of the Plan II TOFC service was *interstate*, as long as the motor portion was intrastate. The Commission, in a case raising the issue of whether certified states are bound by the Commission's exemptions, posed a hypothetical that—unlike the panel's hypothetical—is directly applicable here (*Ex Parte No. 388, State Intrastate Rail Rate Authority*—

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[27] See generally, U.S. Department of Transportation, *Intrastate Motor Carriage and Federal Policy Towards Small Communities* 23-60 (1981) (discussing rigid regulation of motor carrier licensing and rates in Texas).

Pub. L. 96-448, 367 I.C.C. 149, 153 (1983), aff'd, *Illinois Commerce Comm'n* v. *ICC*, *supra*) (footnote omitted):

> Because section 10505, and its underlying policy, is such a significant aspect of the Staggers Act, Congress could not have intended the practical problems and inconsistencies that would result from States retaining jurisdiction over classes of traffic exempted nationwide by the Commission. As an example, a trailer-on-flatcar (TOFC) shipment from Chicago to E. St. Louis, IL could be subject to intrastate regulation, while a TOFC shipment from Chicago to St. Louis, MO only a few miles further, is exempt from all regulation. This would cause unjustifiable operational and/or marketing difficulties for the railroads conducting business for the same class of traffic under both a regulated and unregulated environment. * * * [W]e conclude that Congress did not intend for the continued existence of State regulation that would produce this awkward result—namely, interference with the railroads' and shippers' freedom to take advantage of permitted flexibility in doing business under the Staggers Act.

As the District of Columbia Circuit recognized, in affirming the Commission's decision (*Illinois Commerce Comm'n*, 749 F.2d at 884), "Congressional findings supported the ICC's judgment that continued regulation by States could subvert a federal effort of deregulation through an exemption." [28]

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[28] Judge Scalia dissented in *Illinois Commerce* on the ground that "a Commission class-of-traffic exemption" is not "a 'standard or procedure' of the Commission" to which state regulation is required by Section 11501 to conform (see 749 F.2d at 889). We believe that *Illinois Commerce* was cor-

At no point in its decision did the court below attempt to explain how its ruling furthers any conceivable congressional objective. Indeed, it did not explain why the State of Texas has any interest in regulating trucking activity provided by railroads in the narrow context of Plan II TOFC service. Nor does the panel acknowledge that, as a result of its decision, the Commission's TOFC/COFC exemption will apply in two completely different ways, depending on whether the activity is interstate or intrastate. In short, the panel's opinion would all but nullify the Staggers Act in the area of intrastate Plan II TOFC/COFC activity.

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rectly decided. That question is not presented in this case, however, because unless the portion of service at issue is "transportation provided by a motor carrier" within the meaning of Section 10521, Texas is ousted of jurisdiction by the Commission's denial of certification, not here under review, without regard to the determination that Texas' attempt to regulate TOFC/COFC traffic was inconsistent with federal standards and procedures. We also note that any state that is certified to regulate intrastate rail transportation must, of course, comply with, inter alia, the statutory exemption standards set forth in 49 U.S.C. 10505, on which the Commission's Plan II TOFC/COFC exemption was based.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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QUESTION PRESENTED

Whether the ICC can exempt from regulation, pursuant to 49 U.S.C. §10505, a matter related to a rail carrier but not otherwise within the jurisdiction of that agency, to wit: intrastate motor carriage.

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NO. 85-1222 and 85-1267

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

INTERSTATE COMMERCE COMMISSION,
Petitioner,

V.

STATE OF TEXAS,
Respondent,

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioners,

V.

THE STATE OF TEXAS,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF TEXAS

STATEMENT OF THE CASE

These cases were initially brought to the Fifth Circuit as actions for review of orders of the Interstate Commerce Commission (hereinafter "ICC") in Decision No. 39627, *Petition under 49 U.S.C. 11501(c) by Missouri-Kansas-Texas Railroad Company, et al., for Review of an Order of the Railroad Commission of Texas,* served January 23, 1984, (Cert. App. - p. 16a), and in Decision No. 39704, *Petition of Road-Rail Transportation Company, Inc. under 49 U.S.C. §11501(c) for Review of an order of the Railroad Commission of Texas,* served April 13, 1984, (Cert. App. - p. 24a).

On September 27, 1982, Missouri-Kansas-Texas Railroad Company (hereinafter "MKT") filed an application with the Railroad Commission of Texas (hereinafter "RCT") to exempt from regulation, pursuant to 49 U.S.C. §10505, the transportation of trailer on flat car ("TOFC") and container on flat car ("COFC") (collectively "TOFC/COFC") traffic moving in Texas intrastate commerce to the same extent as interstate TOFC/COFC traffic had been exempted by the ICC. Five railroads — Southern Pacific Transportation Company; Atchison, Topeka and Santa Fe Railway; Missouri Pacific Railroad Company; Burlington Northern Railroad Company; and Fort Worth and Denver Railroad Company -- together with the Texas Industrial Traffic League, a shipper's organization, intervened on behalf of the application. The Common Carrier Motor Freight Association intervened in opposition to the application.

An evidentiary hearing was held on December 2, 1982. A Proposal for Decision was served on October 19, 1983. On December 20, 1983, the RCT entered its order exempting TOFC/COFC rail traffic moving intrastate in the State of Texas, from regulation, but excluding from the exemption, incidental pre-rail and ex-rail truck service. (Joint App. - pp. 11-12).

On December 20, 1983, MKT and the intervening railroads filed a petition with the ICC seeking review of the RCT's Order pursuant to 49 U.S.C. §11501(c). After the reply of the RCT, the ICC entered its order granting the entire exemption sought on January 19, 1984. The State of Texas timely brought its Petition for Review of the ICC's Order.

Meanwhile, on May 16, 1983, Road-Rail Transportation Company, Inc. (hereinafter "Road-Rail"), likewise filed an application with the RCT to exempt from regulation, pursuant to 49 U.S.C. §10505, transportation provided by Road-Railers moving in Texas intrastate commerce. Road-Rail also sought exemption to the same extent as interstate TOFC/COFC traffic which had been previously exempted by the ICC, including not only rail movements but those over the highway.

An evidentiary hearing for Road-Rail was held on August 10, 1983. A Proposal for Decision was served on January 17, 1984. On February 28, 1984, the RCT entered its order exempting from regulation Road-Railer traffic moving intrastate in the State of Texas, but excluding from the exemption those portions of the movements over the highways. The RCT's action in this regard was consistent with its TOFC/COFC position in the MKT case decided some two months earlier. (Jt. App. - pp. 24-36).

On March 13, 1984, Road-Rail filed its petition with the ICC seeking review of the RCT's order. The ICC entered another order granting the entire exemption sought on April 11, 1984. Once again the State of Texas timely brought its Petition for Review to the Fifth Circuit, where the two cases were consolidated for oral argument. The Fifth Circuit granted both petitions for review and reversed the ICC orders reasoning that the ICC acted outside its jurisdiction in attempting to exempt intrastate motor carriage. (Cert. App. - pp. 1a-11a).

SUMMARY OF ARGUMENT

The Interstate Commerce Commission has jurisdiction over interstate rail traffic and, directly or indirectly, over intrastate rail traffic. The ICC also has authority to regulate interstate motor carriers. However, what the Fifth Circuit recognized in the case at bar, is that pursuant to 49 U.S.C. §10521(b) the ICC is prohibited from interfering with the states' regulation of purely intrastate motor carriage.

In the case at bar, the ICC has taken the position that *intrastate* motor carriage is "transportation provided by a rail carrier," thereby bringing such motor transportation within the ambit of ICC jurisdiction. In *American Trucking Association, Inc. v. ICC*, 656 F.2d 1115 (5th Cir. 1981) ("*ATA*"), the Fifth Circuit held that "transportation provided by a rail carrier" included motor vehicle transportation. However, as that same Court[1] below held, and as the State of Texas argues herein, *ATA* concerned *interstate* motor vehicle

1. Rehearing *en banc* was denied in the case at bar. (Cert. App. - Appendix D, p. 12a)

traffic. *Intrastate* motor vehicle transportation is expressly reserved to the states in 49 U.S.C. §10521(b). The State of Texas contends that the ICC's attempted exemption from regulation of the intrastate motor carrier portion of TOFC/COFC traffic was an improper intrusion into an area over which the states retain jurisdiction. The Fifth Circuit below concurred in this conclusion.

The Petitioners have argued strenuously that the actions of the Railroad Commission of Texas were proscribed because the State of Texas had been decertified and that established preemption theories gave the ICC authority to regulate in an area otherwise reserved to the states. Both bases are wrong.

The Court below correctly held that the ICC overstepped its authority when it sought to exempt from regulation the instant motor carrier traffic. Hence, preemption does not apply. Similarly, because intrastate motor carrier regulation is reserved to the states, the issue of Texas's decertification is irrelevant because the states do not need ICC certification to regulate in an area over which they retain exclusive jurisdiction.

ARGUMENT

THE ICC HAS NO AUTHORITY TO EXEMPT FROM REGULATION, PURSUANT TO SECTION 10505, MOTOR CARRIAGE WHICH IS PURELY INTRASTATE IN NATURE.

A. *The ICC's Jurisdiction*

The jurisdiction of the ICC over various forms of transportation is conferred in Chapter 105 of Title 49 of the United States Code. In particular, jurisdiction is found in Subchapter I for railroads, and Subchapter II for motor carriers. Section 10501(a)(1)(a) under Subchapter I, the pertinent provision herein, gives the "Commission jurisdiction over transportation (1) by rail carrier ... that is (A) *only by railroad.*" This jurisdiction applies to (1) interstate rail transportation, (49 U.S.C. §10501(a)(2)), and (2) intrastate rail transportation where, first, a state authority is not certified by the ICC to regulate the intrastate traffic, (49 U.S.C. §11501(b)(4)) or second, a state has exercised its authority in a manner "inconsistent with an order of the Commission issued under this subtitle," or, in a manner prohibited by same. 49 U.S.C. §§10501(c), 11501(c). In short,

the ICC, either directly or indirectly, is given authority over intrastate rail traffic.

However, the ICC's jurisdiction over *motor carriers* does not extend that far. Section 10520 of Subchapter II of Title 49 gives the ICC general jurisdiction over the interstate motor carrier traffic. However, with the exception of certain motor carriers of *passengers*, the ICC has no preemptive authority over the intrastate motor carrier traffic. 49 U.S.C. §10521(b)(1).

B. *ATA Does not Expand the ICC's Jurisdiction to Include Intrastate Motor Carriage*

In 1981, the ICC, acting under 49 U.S.C. §10505, exempted *on an interstate basis* the rail transportation of trailers and containers on flat cars, and the related railroad-owned truck service. *Improvement of TOFC/COFC Regulation*, 364 ICC 731 (1981). That exemption was challenged in *ATA*, upon which the ICC and the Railroads principally rely in asserting that the case at bar should be reversed. It was argued in *ATA* that truck service provided by railroads was not "a matter related to a rail carrier providing transportation subject to the jurisdiction of the [ICC] under this subchapter", within the meaning of §10505, the exemption authority. The Fifth Circuit, while noting both the lack of legislative history and the breadth of the provision in question, held that "rail-owned truck TOFC/COFC service is 'transportation that is provided by a rail carrier.'" 656 F.2d at 1120. The Court added that '[h]ad Congress intended to limit the Commission's exemption authority to rail transportation, it could easily have done so by using that language." *Id.* The Court of Appeals, with seeming reluctance, acknowledged an argument that the jurisdiction over the truck service might be under Subchapter II and, thus, not a proper subject for the exercise of an "arguably ambiguous grant of exemption authority found in subchapter I." 656 F.2d at 1122. The Court concluded, however, that "[the argument was not] sufficient to overcome the broad plain language used in §§10505(a) and 10505(f)." *Id.*

In *ATA*, the Court's conclusion that §10505 did include the power to exempt the over-the-highway movement of TOFC traffic, was based at least in part on the definition of "transporta-

tion" found at 49 U.S.C. §10102(25), which includes "locomotive, car, vehicle, motor vehicle, vessel..." "or equipment of any kind related to the movement of passengers or property" (emphasis added) all under the same definition. The Court of Appeals observed in *ATA:*

> ...transportation has been defined, to include motor vehicle services; while some sectons of the Act apparently do use the word only with reference to a single mode of transportation, e.g., *See,* 10542, other sections contemplate the broader, statutory definition. e.g., §10523.

656 F.2d at 1120 (footnote 9).

The State of Texas submits that, insofar as the Fifth Circuit in *ATA* accepted the idea that §10102(25) represented a broad overall definition of "transportation", that same Court of Appeals found this conclusion clearly wrong and clarified its holding in the case at bar. The *ATA* court's overly broad definition of "transportation" was incorrect for two reasons. The first, and more obvious one, is that §10102(25)(A), which includes a variety of transportation equipment, is in the disjunctive, and plainly does not mean all forms of transportation in all cases. The second, and more subtle reason lies in the legislative history of that provision, originally enacted as part of Public Law 95-473. The House Report on that statute explains the meaning of the bill:

> Substantive change not intended. — Like other codifications undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. *In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged.* 1978 U.S. Code Cong. and Ad. News p. 3,018 (Emphasis added).

In short, §10102 was merely a codification and consolidation of the prior sections of definitions in Title 49. Therefore, with regard to Clause (25) defining "transportation", the real meaning must be obtained from the previous meanings assigned under Title 49, which were separate for rail carrier, motor carrier and water carrier. 49 U.S.C. 1(3)(a) (1959), *repealed by* Pub.L. 95-473, §4(b), Oct. 17, 1978, 92 Stat. 1466, (current version at 49 U.S.C. §10102 Supp. 1986) [rail]; 49 U.S.C. 303(a)(19) (1963), *repealed by* Pub.L. 95-473, §4(b), Oct. 17, 1978, 92 Stat. 1466; Pub.L. 97-449, §7(b), Jan. 12, 1983, 96 Stat. 2444, (current version at 49 U.S.C. §10102 Supp. 1986) [motor carrier]; 49 U.S.C. 902(g),(h) (1963), *repealed by* Pub.L. 95-473, §4(b), Oct. 17, 1978, 92 Stat. 1466, (current version at 49 U.S.C. §10102 Supp. 1986) [water carrier]. Each definition is mutually exclusive of the other; "transportation" in the rail carrier section mentions nothing about motor vehicles. Certainly, since §10102 effected no substantive changes, the meaning of "transportation" when it is applied to rail carriers does *not* include motor vehicle.

As pointed out by the Fifth Circuit in the case at bar, the major saving grace of the exemption in *ATA* was that, although the scope of the exemption was outside of Subchapter I, where the exemption power lies, the ICC was still acting in an area where it had jurisdiction, that of interstate motor carriage. In other words, if an usurpation of power had been made through the exemption, the ICC had only taken it from itself.

Surely, the ICC purporting to act under the broad "matter related to a rail carrier" language of §10505, could not exempt rail carriers from regulation on other matters totally beyond the ICC's authority. Yet, the literal language of §10505 does not limit the exemption power to matters within the ICC's jurisdiction. Under the ICC's expansive reading of §10505, rail carriers could be exempted by ICC edict from regulation of air service and safety requirements of the Federal Aviation Administration if the trailers on flat cars were loaded on airplanes instead of put on the highways. Likewise, the regulations of the Securities and Exchange Commission, the Environmental Protection Agency, the Occupational Health and Safety Administration, or any other agency could be found burdensome by the ICC and lifted from the shoulders of the railroads. Of greater import to Texas, however, is the possibility that under

the ICC's theory the trucks operated by the railroads, already free of the RCT's requirements concerning insurance and hours of driver operations, could be relieved from complying with the Texas laws prohibiting over-weight and over-size vehicles, and requiring licensing and vehicle safety inspection. Congress cannot have intended such results. The ICC cannot be permitted to exempt matters over which it has no jurisdiction. One cannot give away what one does not possess.

Clearly one area in which the ICC has no jurisdiction is intrastate motor carriage, such as the highway movements herein. This area is, and has always been, subject to the control of the states, and is actively regulated in Texas by the Railroad Commission. The attempt by the ICC to secure for itself that jurisdiction through further preemption of state jurisdiction is both unjustified and unauthorized.

C. *Preemption Analysis: No Preemption Absent "Clear and Manifest Purpose"*

The doctrine of preemption is based on the Supremacy Clause of the United States Constitution, art. VI, cl. 2. The Supremacy Clause provides that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." A state law may be contrary to federal law and therefore preempted, in either of two general ways. First, if Congress intended to occupy a given field exclusively, any state law within that field is preempted. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 621 (1984) *reh. denied*, 104 S.Ct. 1430 (1984); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-526, 97 S.Ct. 1305 (1977). Second, in areas that Congress did not intend to occupy exclusively, state laws are valid unless they actually conflict with federal law, in which case they are preempted. *Id.*

Absent strong and unequivocol evidence of Congressional intent, courts will not find that Congrss has taken over a given field and displaced all state regulation. Before depriving the states of their historic right to exercise their police powers in an area, courts have required a demonstration that complete ouster was Congress's "clear and manifest purpose." *De Canas v. Bica*, 424 U.S. 351, 357 (1976); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1983). Express

statutory language is the principal evidence of congressional intent to occupy a field of regulation exclusively. *See Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 204 (1983).

(1) Explicit Statutory Limitation on Federal Preemption of Intrastate Motor Carriage

The State of Texas does not contest that Congress has clearly preempted state economic regulation of intrastate rail traffic either directly or indirectly pursuant to 49 U.S.C. §11501(b) and (c).[2] Rather, the State contends that it is equally clear that preemption does not extend to intrastate motor carriers of property because of the explicit proscription in §10521(b) as follows:

> (b) This subtitle does not-
> (1) except as provided in sections 10922(c)(2), 10935 and 11501(e)[3] of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier;...

(2) Implied Preemption: No Congressional Intent to Displace the Field as to Intrastate Motor Carriers of Property.

In *Pacific Gas and Electric* this Court ruled that although Congress had, through the Atomic Energy Act, preempted the field as to the safety regulation of nuclear power plants the states could determine "as a matter of economics — whether a nuclear plant vis-a-vis a fossil fuel plant should be built." 461 U.S. 222. Here, unlike *Pacific Gas and Electric*, there is specific statutory language (49 U.S.C. §10521) and a long history of state regulation over motor carriers which militates in favor of

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2. Section 11501 entitled "Interstate Commerce Commission Authority over Intrastate Transportation" grants preemption for three classes of carriers: 1) freight forwarders, 11501(a); 2) rail carriers, 11501(b) - (d); and 3) motor common carriers *of passengers*, 11501(e). Conspicuously absent are motor common carriers of property, at issue in the instant case.

3. Sections 10922(c)(2), 10935 and 11501(e), relate to motor carriers of passengers, conforming 10521 with the express exemptions from State authority in 11501. See footnote 2 above.

the conclusion that Congress did not intend to preempt states from the regulation of intrastate motor carriage within their respective borders.

The holding in *Pacific Gas and Electric* indicates that even without the specific reservation of regulatory power to the states contained in 49 U.S.C. §10521, the acknowledged preemption relating to intrastate *rail* traffic does not implicitly subsume the legitimate interests of the states involved in the economic and safety regulation of *intrastate* motor carriage.

These economic considerations were addressed by the RCT hearings examiner in the Road-Rail application, as follows:

> The Commission must be concerned about the viability of motor carriage for at least two reasons. One, a healthy motor carriage industry is the predicate for this exemption [under 49 U.S.C. §10505]. One of the protections to shippers from the abuse of market power by Road-Rail is the availability of transportation alternatives. Motor common carriage is a major one.
>
> Secondly, pursuant to Tex. Rev. Civ. Stat. Ann. art. 911b § 4(d), the Commission is charged to regulate motor carriers "so as to carefully preserve, foster and regulate transportation." An exemption for railroad motor carriage would place the exemption power of the Commission at war with its regulatory duty. Road-Rail has not submitted any authority that would relieve the Commission of its regulatory duty other than the ICC action regarding interstate traffic. (Jt. App. - p. 30)

In both the Road-Rail and the MKT applications the RCT found that, "[i]f both the ground and rail movements were exempt then the railroads would be at a competitive advantage over regulated intrastate state (sic) motor carrier service." (Jt. App. - pp. 16, 31). In addition to these economic considerations, the other tests for implicit preemption are not applicable to this case.

In the absence of explicit preemptive language, congressional intent to displace all state regulation may be inferred only if:

(a) "'a scheme of federal regulation [exists that is] so pervasive as to make reasonable the inference that Congress left no room to supplement it;'" (b) the federal law "'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject;'" or (c) "'the object sought to be obtained by the federal law and the character of the obligations imposed by it'" reveal a congressional purpose of excluding all state action. *Pacific Gas and Electric*, 461 U.S. at 204. Courts have consistently rejected claims that Congress has impliedly preempted a given field whenever one of these is not extant, or other equally strong proof of Congressional intent to displace state regulation is lacking. *See, e.g., Arkansas Electric Cooperative v. Arkansas Public Service Commission*, 461 U.S. 375, 103 S.Ct. 1905, 1915 (1983). Here, the specific proscription against federal regulation of intrastate motor carriers of *property* excludes implied preemption.

(3) Conflict with Federal Law: No Legal or Factual Conflict

Courts are also extremely reluctant to find preemption of state law because of actual conflict with federal law. Here, too, preemption is disfavored in recognition of the states' historic right to exercise their police powers. An actual conflict may be explicit in the sense that compliance with both federal and state law is physically impossible. *Silkwood*, 104 S.Ct. at 261; *Pacific Gas and Electric Co.*, 103 S.Ct. at 1722. Or, an actual conflict may arise implicitly when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). A finding of preemption on the basis of conflict between state and federal law is justified only if it is impossible to reconcile the operation of both statutory schemes with one another. *De Canas*, 424 U.S. at 357, n. 5 (citations omitted).

Certainly, in light of the clear wording of §10521(b), there can be no question of any conflict between state statutes regulating motor carriers of property (Tex. Rev. Civ. Stat. Ann. art. 911b) and federal statutes regulating same. Indeed, the ICC and the Railroads do not assert any such conflict. Yet, the ICC

claims that under 49 U.S.C. §11501(c) it has acquired jurisdiction over motor carrier service by a railroad due to the RCT's decertification. The House Conference Report on §11501 (Section 214 of the Staggers Act) describes that provision as follows:

> Accordingly, the Act preempts state authority over *rail* rates, classification, rules and practices. H.R. No. 96-1430, 96th Cong. 2nd Session (1980), *reprinted in* 1980 U.S. Code Cong. and Ad. News 4138.

Nowhere in the Congressional history does it indicate that §11501(b) - (d) has anything to do with motor vehicle transportation. As the Court of Appeals noted in *ATA*, the same is true in regard to §10505: "Our review of the competing contentions leaves us with some doubt as to whether Congress had any intent whatsoever on that issue." 656 F.2d at 1120. However in this case, unlike *ATA*, the issue is preemption or no preemption, and absent a clear Congressional intent, the issue must fall on the side of the State, since implied preemption is not favored. *DeCanas v. Bica*, 424 U.S. 351, 357 (1976); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-57 (1963); *Schwartz v. State of Texas*, 344 U.S. 199, 202-203 (1952).

If further reason is needed to sustain the State's position, one might imagine the scenario in which (1) the RCT remained decertified by the ICC and (2) the ICC sought to revoke the exemption sought by the Railroads herein and reassert jurisidiction pursuant to §10505(d). That reassertion could only be effective as to the *rail* TOFC/COFC and Road-Railer movements because §10501 specifically provides for ICC jurisdiction over intrastate rail traffic where there is not a certified state agency. Yet the ICC could not reassert authority over intrastate motor carriage of property, because under §10521, such motor carrier jurisdiction is *specifically excluded*. In other words, just as the ICC cannot exempt that which it does not possess under §10505, the ICC cannot exercise regulatory authority it does not possess.

D. *The Fifth Circuit's Scenario is Appropriate.*

Both Petitioners have sharply denounced the Fifth Circuit's worst-case scenario which clearly exemplifies the potential harm

the ICC's order could cause to intrastate motor carrier regulation. However, neither the ICC nor the Railroads can overcome the essential truth of the Court of Appeals' example.

Both Petitioners point out that the Fifth Circuit refers to a small *intra*state railroad and assert that the ICC has no jurisdiction over intrastate railroads. Therefore, they contend, the example is inapposite. This complaint is clearly without substance. While it is true that the ICC orders in question herein pertain only to interstate railroads and related motor carriage, those orders purport to exempt only *intrastate* motor vehicle and rail operations performed by those railroads. Thus, the Court of Appeals' scenario applies to the intrastate operations which were sought to be exempted. Indeed, the lower court's example of the potential abuse which could occur as a result of use of unregulated motor carriage is strengthened by the fact that the larger interstate railroads have a greater ability to put a tremendous number of trucks on Texas highways than would a small intrastate railroad. Justice Politz's use of the phrase "potential mischief" understates the devastation that such fleets of rail-owned trucks could wreck upon Texas's regulated motor carriers if permitted the unfair competitive advantage of deregulation.

The ICC states that "there is no reason to think either that this example is realistic or that the Commission could not recognize and deal with a subterfuge." ICC Brief at p. 36. The State of Texas submits that it has no reason to believe otherwise. In point of fact, Road-Rail applied to the RCT for routes which included motor carriage from points as distant as Brownsville, Texas, to rail connection in Houston, Texas, a distance of over 300 miles. (Jt. App. - pp. 28-29[4]). Only after

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4. The RCT examiner concluded that:

> ...although the railroad movement in Road-Rail equipment may be limited to rail corridors, the scope of the application as proposed is not sufficiently limited to ensure the availability of transportation alternatives. Road-Rail testified that it will solicit ground movement of traffic as far as the economics dictate. Road-Rail envisions solicitation of road traffic to Houston from points as far as Brownsville and the Valley, a distance of over 300 miles. The line-haul movement by rail from Houston to Dallas will be approximately 240 miles (Houston and Dallas are the only scheduled intrastate stops of the South-West Xpress). According-

(footnote continued on following page)

this long journey as a motor carrier, would the Road-Rail equipment be placed on a railroad track for the 240 mile movement to Dallas. *Id.* Yet, despite these facts, the ICC willingly and quickly granted Road-Rail's requested exemption without investigation as to whether a subterfuge to avoid state motor carrier regulation may have been Road-Rail's true intent.

The State of Texas submits that based on the ICC's ruling in the Road-Rail case, the ICC will not investigate on its own initiative future operations by railroad-owned trucks which it has ordered exempt from regulation. Nor is the ICC likely to hear a complaint about such an operation from a state it has decertified from regulating rail traffic.

E. *Railroad-owned Motor Vehicles are "Motor Carriers"*

The ICC argues at some length that motor carriage in rail-owned vehicles, in connection with a measure of rail movement, is not transportation by a motor carrier subject to the jurisdictional limitations of 49 U.S.C. §10521. However, these arguments do not withstand scrutiny.

The question of whether a given type of vehicular traffic constitutes a "motor carrier" operation does not depend on ownership of the vehicle. Clearly the ICC would not find that trucks owned by a grocery store, but used to transport property for others across state lines for compensation, to be engaged in transportation other than as a motor carrier. The initial pertinent inquiry under both Texas and federal law, in determining whether a carrier is a "motor carrier" is whether the transportation is by a motor vehicle transporting property for compensation.[5] The Interstate Commerce Act definition of

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ly, Road-Rail will be soliciting road transportation at distances greater than it will be moving the traffic by rail. (Tr. 42). In those instances, Road-Rail's primary business will be motor carriage. (Jt. App. - pp. 28-29).

5. Compare: 49 U.S.C. §10102(12)-(14),

(12) "motor carrier" means a motor common carrier and a motor contract carrier.

(13) "motor common carrier" means a person holding itself out to the general public to provide *motor vehicle transportation for compensation* over regular or irregular routes, or both.

(footnote continued on following page)

"motor vehicle" specifically excludes equipment "operated only on a rail". 49 U.S.C. §10102(16). Conversely, the definition of "railroad" does not include motor vehicles. 49 U.S.C. §10102(20). Yet, the ICC contends that the motor carriage in connection with TOFC/COFC traffic is not motor carrier traffic because the railroads do not hold themselves out to the public to provide motor carriage. This argument is illogical and impossible to support. When a railroad represents that it is providing TOFC/COFC service, that railroad is *necessarily* holding itself out to provide both motor and rail carriage. That is the nature and advantage of TOFC/COFC service.

The ICC's strained construction of the relevant definitions creates unnecessary conflict, particularly between §11501 and §10521. In comparison, the Fifth Circuit's solution correctly harmonizes the statutory sections as follows: 1) the ICC can exempt *interstate* motor vehicle traffic in connection with TOFC/COFC movements, but 2) the ICC may not exempt similar *intrastate* motor carriage. Contrary to the ICC's assertion, this result does not do violence to the holding in *ATA*. Rather, the Fifth Circuit has simply refined its prior holding

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(14) "motor contract carrier" means —

(A) a person, other than a motor common carrier, providing motor vehicle transportation of passengers for compensation under continuing agreements with a person or a limited number of persons —

(i) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or

(ii) designed to meet the distinct needs of each such person; and

(B) a person providing *motor vehicle transportation of property for compensation* under continuing agreements with one or more persons —

(i) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or

(ii) designed to meet the distinct needs of each such person. [emphasis added].

with, Tex. Rev. Civ. Stat. Ann. art. 911b §1(g),

(g) The term "motor carrier" means any person, firm, corporation, company, copartnership, association or joint stock association, and their lessees, receivers, or trustees appointed by any court whatsoever owning, controlling, managing, operating, or causing to be operated any motor-propelled vehicle used in *transporting property for compensation* or hire over any public highway in this state, where in the course of such transportation a highway between two or more incorporated cities, towns, or villages is traversed. [emphasis added].

by clarifying the fact that while the ICC has expansive jurisdiction over interstate TOFC/COFC, the states retain jurisdiction over local motor carriage in connection with TOFC/COFC traffic.

F. *The Fifth Circuit Upholds Congressional Intent.*

Both the ICC and the Railroads assert that the decision in the case at bar subverts the Congressional intent behind the Staggers Act by creating burdensome dual regulation. However, these complaints are more appropriately addressed to Congress which has permitted the individual states to maintain jurisdiction over intrastate motor carriers of property.

Likewise, only Congressional action can solve the "problem" the Railroads attempt to demonstrate by a hypothetical situation in which a motor carrier movement from Dallas to Texarkana, Texas, is regulated whereas a similar shipment to Texarkana, Arkansas, is not regulated. Railroads' brief p. 11. The real complaint goes to the difference between intrastate motor carrier regulation, which is actively pursued in Texas, and interstate motor carriage which is only minimally regulated by the ICC. A line-haul motor carrier movement from Dallas to Texarkana, Texas, will generally be regulated by Texas, whereas a similar movement to Texarkana, Arkansas will not be regulated by Texas. The Railroads' hypothetical situation merely reflects the nature of motor carrier regulation from a point in one state to any two points close to the border of neighboring states, it bears no relation to whether motor carriage in connection with TOFC/COFC traffic can be exempted by the ICC. Any "disparity" in motor carrier regulation is Congressionally condoned.

In the instant case, the Court of Appeals properly refused to allow the ICC to unilaterally enlarge its jurisdiction to include a matter specifically reserved to the states.

G. *The Practical Impact Is Minimal.*

Despite the protests of the ICC and Railroads, the practical impact upon the railroads of the decision in question should be minimal unless, as the Fifth Circuit hypothesized, the railroads intend to expand their trucking operations in Texas

into a major industry. As the RCT's examiner reported in her October 19, 1983, proposal for decision:

> Truck service performed by motor carriers will continue to be regulated by the RCT. This will have minimal impact on the railroads, because *as pointed out in testimony by the railroads, virtually all of the various TOFC/COFC plans* used by shippers involving prior or subsequent movements by truck are within RCT established commercial zones and as such *are already exempt* from RCT jurisdiction. (Emphasis added) (Jt. App. - p. 18).

The proposition discussed by the examiner has been upheld in *Steve D. Thompson Trucking, Inc. v. State of Texas, et al.*, 685 S.W.2d 129 (Tex. App. - Austin 1985, writ ref'd, n.r.e.), wherein pre-rail and ex-rail pickup and delivery service by a private trucking company in connection with TOFC/COFC movements was held exempt from RCT regulation when the pickups and deliveries were made within Texas commercial zones.

These commercial zones in Texas are indeed quite extensive, covering the major metropolitan areas of the State. The Appendix attached hereto, sets out in full the RCT regulations enacting the current commercial zones. Additional zones can be added by the RCT. Tex. Rev. Civ. Stat. Ann. art. 911b §1(g).[6] It should also be noted that most of the truly

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6. Art. 911b §1(g) includes three provisos following the definition of "motor carrier" (see n. 5 supra), as follows:

Provided, that the term "motor carrier" as used in this Act shall not include, and this Act shall not apply to motor vehicles engaged in the transportation of property for compensation or hire between points:

(1) Wholly within any one incorporated city, town or village;

(2) Wholly within an incorporated city, town or village and all areas, incorporated or unincorporated, wholly surrounded by such city, town or village;

(3) So situated that the transportation is performed wholly within an incorporated and immediately adjacent unincorporated area without operating within or through the corporate limits of more than a single incorporated city, town or village, except to the extent provided in (2) above; or

(4) Wholly within the limits of a base incorporated municipality and any number of incorporated cities, towns and villages which are immediately contiguous to said base municipality.

incidental pre-rail and ex-rail pickup and delivery service, in and around municipalities, is likewise exempt under the Texas Motor Carrier Act. *Id.*

The State only seeks to regulate the non-exempt highway transportation between two or more incorporated cities. Unlike similar movements in other states, in Texas these movements often include many miles of highway. For example, in the Railroads' hypothetical shipment by rail from Houston to Dallas and thence by motor vehicle to Texarkana, Texas, the motor vehicle covers more than 180 miles of Texas roads. The State must be able to regulate motor carriage of this magnitude.

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Provided further, that motor carriers authorized to serve any incorporated city, town or village within the areas described in (2), (3), and (4) above, except carriers of commodities in bulk in tank trucks and all specialized motor carriers, may perform service for compensation or hire between all points within the areas described in (2), (3) and (4) above, on the one hand, and, on the other, authorized points beyond such areas without a certificate or permit authorizing service at all points within such areas when such transportation is incident to, or a part of, otherwise regulated transportation performed under a through bill of lading.

Provided further, that after notice and public hearing the Railroad Commission of Texas is hereby authorized, except as to operations of carriers of commodities in bulk in tank vehicles and all specialized motor carriers, from time to time and where necessary, to define and prescribe, and where necessary shall prescribe, commercial zones adjacent to and commercially a part of any specified incorporated municipality and within which operations as a motor carrier may be performed without a certificate or permit authorizing same and within which strictly local service wholly within such commercial zone may be performed at rates and charges other than those prescribed by the Commission. The Commission in so determining and prescribing the limits of any commercial zone shall take into consideration its powers and duties otherwise to administer and enforce the Motor Carrier Act considered in the light of the economic facts and conditions involved in each commercial zone or proposed commercial zone, particularly the effect that unregulated transportation for compensation or hire within such zone or proposed zone has had or may have upon fully regulated motor carriers operating in regulated intrastate commerce to, from and within such commercial zone. The Railroad Commission is empowered to prescribe such rules and regulations for operation of such transportation as the Commission deems in the public interest.

H. *The Decision Below is not Contrary to this Court's Recent Precedent*

The Railroads take the position that the decision below conflicts with this Court's recent holding in *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi*, 474 U.S. _____; 106 S.Ct. 709; 88 L.Ed. 2d 732 (1986) ("Transco"). That reliance is misplaced.

In *Transco*, the Court reversed an order of the Mississippi Oil and Gas Board requiring Transcontinental Gas Pipe Line Corporation to "ratably take" gas from the Harper Sand gas pool. The gas in that field had been classified as "high cost" natural gas under §107(c)(1) of the Natural Gas Policy Act, 15 U.S.C. §3301, et seq. ("NGPA"), and as such, was exempted from the otherwise pervasive jurisdiction of the Federal Energy Regulatory Commission ("FERC"). However, as the opinion noted, the decision to remove "high cost" gas from FERC's jurisdiction was not tantamount to Congressional intent that states should fill the regulatory void. Thus, the *Transco* case stands for the proposition that a clear federal intent to leave an area *un*regulated has as much preemptive effect as an affirmative federal decision *to regulate*. 106 S.Ct. 709, 717; *See also Arkansas Electric Cooperative v. Arkansas Public Service Commission, supra.*

Contrary to the Railroads' assertion, the facts in *Transco* are different from the situation here. What distinguishes the case at bar from *Transco* is the express reservation of power to the states in 49 U.S.C. §10521(b) allowing them to continue to regulate intrastate transportation provided by a motor carrier of property. That is, while the Railroads correctly contend that the implementation of the Staggers Act demonstrates Congressional intent to largely substitute market forces for regulation, they incorrecty conclude that the states are thereby ousted from *all* regulation affecting railroads unless the states first have been certified by the ICC.

Section 10521(b) reserves to the states certain intrastate jurisdiction. As such, the *Transco* case cited by the Railroads is inapposite. The present dispute is not a case where Texas has sought to fill a regulatory void as Mississippi attempted

to do in *Transco;* rather, it is an instance of a state exercising those powers expressly reserved to it by the statute.

Curiously, while the Petitioners rely on *Transco* to assert that Texas cannot "step in" and replace federal regulation, neither the ICC nor the Railroads mention a more recent and more important case decided by this Court, *Louisiana Public Service Commission, et al. v. Federal Communications Commission,* _____ U.S. _____, 106 S.Ct. 1890, _____ L.Ed. 2d _____ (1986) (*"Louisiana PSC"*). Texas submits that *Louisiana PSC* controls the disposition of this case.

In *Louisiana PSC* the Federal Communications Commission ("FCC") raised the same arguments as the ICC and the Railroads do here. The FCC contended that §220(b) and §151 of the Communications Act of 1934 ("Communications Act"), 47 U.S.C. §151 et seq., gave it jurisdiction to preempt contrary depreciation practices adopted by the states. The argument was based on the notion that §220(b) of the Communications Act gave the FCC an exclusive grant of power to set depreciation rates and if states were allowed to set different rates they would frustrate the larger federal policy of increasing competition in the telecommunications industry.

That argument failed in *Louisiana PSC* for the same reason the Petitioners' argument fails here; there remains a reservation of power to the states which, in this case allows them to continue regulating those aspects of intrastate motor carriage which Congress has expressly withheld from the ICC. In *Louisiana PSC* the FCC was prevented from encroaching on intrastate depreciation rates and practices by §152 of the Communications Act which states in pertinent part (47 U.S.C. §152(b)):

> Except as provided in section 224 of this title and subject to the provision of section 301 of this title and subchapter V-A of this Chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier...

When compared with the language of 49 U.S.C. §10521(b), it is clear that Texas acted wholly within the regulatory sphere reserved to it by the very statute under which the ICC purported to preempt. That exercise of jurisdiction by the state was not Constitutionally infirm and the Fifth Circuit's recognition of that fact should be affirmed.

CONCLUSION AND PRAYER

For the reasons stated herein, the State of Texas respectfully prays that the judgment and opinion below be in all things affirmed.

Respectfully submitted,

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APPENDIX A

COMMERCIAL ZONES

§5.291(051.03.16.001). Designation of Commercial Zones.

After notice and public hearing, the commission may, where necessary, define and prescribe commercial zones, each of which shall comprise the geographical area which is adjacent to and commercially a part of an incorporated municipality. Except as to transportation of commodites in bulk in tank vehicles and except as to all specialized motor carriers, the following exemptions are provided with regard to operations within said commercial zones:

(1) Operations as a motor carrier therein may be performed without a certificate or permit authorizing same.
(2) Strictly local service wholly within any such commercial zone may be performed at rates and charges other than those prescribed by the commission.

§5.292 (051.03.16.002). Factors Considered by the Commission.

In determining the necessity of the designation of an area as a commercial zone, the commission shall take into consideration its powers and duties under the motor carrier act in view of the economic conditions in each proposed or established commercial zone, and particularly the effect that unregulated transportation has had or may have upon fully regulated motor carriers operating to, from, and within such commercial zone.

§5.293 (051.03.16.003). Restrictions on Exemptions.

(a) The existence of a commercial zone shall not in any manner affect the rates on shipments between places or points within the prescribed commercial zone and places or points beyond such zone.
(b) The existence of a commercial zone shall not in any manner affect the pick-up or delivery service, or both, on shipments moving between places and points within the prescribed commercial zone and places or points beyond such zone.

§5.294.Existing Commercial Zones.

Commercial zones defined and prescribed by the commission after notice and hearing are as follows:

(1) The Dallas commercial zone shall include the following:

(A) The incorporated City of Dallas.

(B) The incorporated City of Fort Worth.

(C) The following cities and towns which are adjacent to and commercially a part of the City of Fort Worth: Haltom City, Watauga, Richland Hills, North Richland Hills, Hurst, Bedford, Colleyville, Grapevine, Euless, Arlington, Pantego, Dalworth Gardens, Kennedale, Forrest Hill, Everman, Burleson, Crowley, Edgecliff, Benbrook, Aledo, White Settlement, Westover Hills, Westworth Village, River Oaks, Sansom Park, Lake Worth Village, Lakeside, Azle, Saginaw, Mansfield, and Blue Mound.

(D) The following cities and towns which are adjacent to and commercially a part of the City of Dallas: Highland Park, University Park, Renner, Plano, Richardson, Buckingham, Garland, Rowlett, Mesquite, Sunnyvale, Balch Springs, Kleberg, Seagoville, Hutchins, Wilmer, Fruitdale, Lancaster, De Soto, Woodland Hills, Cedar Hill, Duncanville, Cockrell Hills, Grand Prairie, Irving, Coppell, Carrolton, Farmers Branch, Addison, and Lewisville.

(E) The county of Rockwall.

(F) The City of Wylie.

(2) The Fort Worth commercial zone shall include the following:

(A) The incorporated City of Fort Worth.

(B) The incorporated City of Dallas.

(C) The following cities and towns which are adjacent to and commercially a part of the City of Dallas: Highland Park, University Park, Renner, Plano, Richardson, Buckingham, Garland, Rowlett, Mesquite, Sunnyvale, Balch Springs, Kleberg, Seagoville, Hutchins, Wilmer, Fruitdale, Lancaster, De Soto, Woodland Hills, Cedar Hill, Duncanville, Cockrell Hills, Grand Prairie, Irving, Coppell, Carrolton, Farmers Branch, Addison, and Lewisville.

(D) The following cities and towns which are adjacent to and commercially a part of the City of Fort Worth:

Haltom City, Watauga, Richland Hills, North Richland Hills, Hurst, Bedford, Colleyville, Grapevine, Euless, Arlington, Pantego, Dalworth Gardens, Kennedale, Forrest, Hill, Everman, Burleson, Crowley, Edgecliff, Benbrook, Aledo, White Settlement, Westover Hills, Westworth Village, River Oaks, Sansom Park, Lake Worth Village, Lakeside, Azle, Saginaw, Mansfield, and Blue Mound.

(3) The Houston commercial zone shall include the incorporated City of Houston and the following cities, towns, and areas which are adjacent to and commercially a part of the City of Houston: Spring Valley, Hedwig Village, Hunter's Creek Village, Piney Point Village, Hilshire Village, Bunker Hill Village, Bellaire, West University Place, Southside Place, Galena Park, Jacinto City, Missouri City, Pearland, Friendswood, Webster, League City, Seabrook, Shoreacres, La Porte, Lomax, Deer Park, Pasadena, South Houston, Baytown, El Lago, Taylor Lake Village, Jersey Village, Humble, and the areas lying within the channel easement and adjacent unincorporated areas bounded on the north by Interstate Highway 10, eastward to Baytown, and on the south by State Highway 225 eastward to La Porte, and the channel easement from its origin in midtown Houston to Galveston Bay; the Bayport, Clear Lake City, and NASA developments; the unincorporated area in southeast Harris County lying south of State Highway 225, north of the Harris County-Galveston line, and east of Pearland and Friendswood; Stafford; and an area embracing all points within one mile of the present location of the United States Post Office which is designated in the *United States Postal Guide* as the town of Highlands, Texas; Sugar Land, Texas City, La Marque, Hitchcock, Galveston, Manvel, Dickinson, Alvin, Katy, Tombal, and Conroe.

(4) The San Antonio commercial zone shall include the following:

(A) The incorporated City of San Antonio.

(B) The following cities, towns, military establishments, and areas which are adjacent to and commercially a part of the City of San Antonio: Balcones Heights, Castle Hills, Hill Country Estates, Olmos Park, Alamo Heights, Terrell Hills, Fort Sam Houston, Windcrest, Kirby, Brooks Air Force Base, East Kelly Air Force Base, Kelly Air Force

Base, Leon Valley, Lackland Air Force Base, Hollywood Park, Live Oak, Shavano Park, and China Grove.

(5) The Beaumont, Orange, and Port Arthur commercial zone shall include the following:

(A) The incorporated City of Beaumont.

(B) The incorporated City of Orange.

(C) The incorporated City of Port Arthur.

(D) The following cities, towns, and areas which are adjacent to and commercially a part of the City of Beaumont: the unincorporated area bounded by the corporate limits of Beaumont and a line beginning where Interstate Highway 10 crosses the southwest corporate limits of Beaumont, thence in a southwesterly direction along Interstate Highway 10 to its intersection with FM Road 365, thence in an easterly direction along FM Road 365 to the corporate limits of Port Arthur, thence in a northerly and easterly direction along the westerly and northerly corporate limits of Port Arthur, Nederland, Port Neches, to the south bank of the Nueces River thence along the south bank of the Neches River to a point where the south bank meets Beaumont city limits west of the Mobil Oil Company property across the Neches River from the corporate limits of Orange (as created by the 1960 Orange strip annexation).

(E) The following cities, towns, and areas which are adjacent to and commercially a part of the City of Orange: Pinehurst, West Orange; the unincorporated area within and surrounded by the corporated limits of Orange; and the unicorporated area north of Orange bounded on the east by the Sabine River, on the north by a county road that runs east-northeast, on the west by State Highway 87 and on the south by the corporate limits of Orange.

(F) The following cities, towns, and areas which are adjacent to and commercially a part of the City of Port Arthur: Lakeview, Pear Ridge, Griffing Park, Nederland, Port Neches, and Groves; the unicorporated area bounded by the corporate limits of Port Arthur, Nederland, Port Neches, and Orange; Port Neches; the unicorporated area within and surrounded by the corporate limits of Port Neches, Groves; the unincorporated area within and surrounded by the corporate limits of Port Arthur; and the

unincorporated area south of FM Road 365 between the corporate limits of Port Arthur and a line beginning where the west bank of Hillebrant Bayou is crossed by FM Road 365, thence along the west bank of Hillebrant Bayou to its confluence with Taylor's Bayou, thence in a southeasterly direction along the west and south banks of Taylor's Bayou, (including the whole of Gulf Oil Corporation's and Sinclair-Koppers Company's property and docks) to its confluence with the gulf intracoastal waterway, thence along the west and north banks of the gulf intracoastal waterway to the corporate limits of Port Arthur.

(6) The Corpus Christi commercial zone shall include:

(A) The incorporated City of Corpus Christi.

(B) The territory enclosed by a line beginning at the intersection of the southern boundary of Nueces County and the line of mean low tide on the gulf shoreline of Padre Island; then westward along the southern boundary of Nueces County to the first inland road at or near the Laguna Madre, at a point called Hardpan; then northerly on the road from Hardpan to its intersection with FM Road 70; then along FM Road 70 to its intersection with Highway 286 southerly to the Nueces County line; then westerly on the Nueces County line to its intersection with Petronila Creek; then northwesterly along Petronila Creek to its intersection with FM Road 70; then westerly on FM Road 70 to its intersection with FM Road 892; then northerly on FM Road 892 to its intersection with FM Road 2826; then westerly on FM Road 2826 to its intersection with FM Road 666; then northeasterly on FM Road 666 to its intersection with the municipal limits of Banquete, Texas; then westward and northward along the municipal limits of Banquete, Texas, to the Texas-Mexican Railway railroad track; then westerly on the Texas-Mexican Railway tracks to the Nueces County line; then northward and eastward along that line to the centerline of the Nueces River; then northerly and westerly (upstream) along the centerline of the bed of the Nueces River to the dam on the Nueces River impounding Lake Corpus Christi; thence to the upstream side or face of the said dam northward and eastward along the dam to the shoreline of Lake Corpus Christi; thence northwesterly with the meanders of

the said shoreline to the most distant intersection of the said shoreline with the boundary of Lake Corpus Christi State park; thence northeasterly along the northern boundary of the park; thence southwesterly along the northeastern boundary of the said park to the point where such boundary first intersects a line parallel to and 1,000 feet distant from the centerline of FM 1068; thence along such line to the city limits of Mathis; then northward and eastward along and around the Mathis city limits to the point where such city limits intersect the centerline of FM 3024; then souteastward along the Mathis city limits line to a point on such line 300 feet northwesterly of the centerline of State Highway 359 across IH 37 to a point 1,000 feet from the centerline of IH 37; then southeasterly along a line parallel to and 1,000 feet northeastward of IH 37 to the intersection of such line with a line parallel to and 300 feet northward of the centerline of FM 881; then eastward along such line parallel to and 300 feet northward of FM 881 to the western city limits of Sinton, Texas; then around the northern boundaries of the city of Sinton, to a point on the eastern side of Sinton where the city limits intersects a line parallel to and 1,000 feet distant from the centerline of U.S. Highway 181 on the northward side of said highway; then southeasterly along such line parallel to U.S. 181 to the city limits of Taft; then northeasterly and around the city limits of Taft in a clockwise direction to the intersection of the Taft city limits with a line parallel to and 1,000 feet distant from the centerline of U.S. Highway 183 on the northward side of the said Highway 181; then along said line parallel to U.S. Highway 181 to the intersection of the said line with the western city limits of Gregory, Texas; then northeasterly and clockwise around the city of Gregory to the point where the city's boundary first intersects a line parallel to and 1,000 feet distant from the centerline of State Highway 35; then northeasterly along such line parallel to but northward and westward from State Highway 35 to a point where such line intersects the city limits of Aransas Pass; then northeasterly along the city boundary to a point where it intersects the common boundary of Aransas and Nueces Counties; then continuing first northeasterly then southeasterly along the boundary of the city of Aransas Pass across State Highway 35 to the intersection of the said common boundary and the centerline of the Gulf Intracoastal Waterway in Redfish Bay; then northeasterly to the most northward point of

the said centerline in Nueces County; then along the common boundary of Nueces and Aransas Counties to the point such common boundary intersects the city limits of Port Aransas; then along the northerly and easterly city limits of Port Aransas to their most southerly reach on the mean low tide line on the gulf shoreline of Mustang Island; then southward along the mean low tide line of the gulf shoreline of Mustang Island to the gulf shoreline of Padre Island, crossing the jettied channel immediately north of Mustang Island State Park by projecting the line of mean low tide as if such jetties and channels were not built; then southward along the said mean low tide line of the Gulf of Mexico on Padre Island to the point of beginning, and including all the area enclosed by the boundaries described in this subparagraph.

Supreme Court, U.S.
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CLERK

No. 85-1222 and No. 85-1267

In The

Supreme Court of the United States

October Term, 1985

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

AND

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, AND SOUTHERN PACIFIC TRANSPORTATION COMPANY

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This brief is filed by petitioners, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company and Southern Pacific Transportation Company (hereinafter referred to as "Railroads") in reply to the brief filed by the State of Texas (Texas). As will be shown below, Texas' position is contrary to applicable law and should be rejected. The issue before this Court is whether the Interstate Commerce Commission (ICC) has the power to exempt from regulation under 49 U.S.C. 10505[1] the motor portion of trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) intrastate transportation provided by a rail carrier as part of a continuous intermodal move in intrastate commerce. As noted below, the power of the ICC to exempt the same interstate service has been upheld by the same circuit in *American Trucking Associations v. Interstate Commerce Commission*, 656 F.2d 1115 (5th Cir. 1981) (*ATA*). Railroads respectfully submit that the ICC clearly has the power to exempt the motor portion of such intrastate transportation provided by a rail carrier.

I. THE SERVICE AT ISSUE IS TRANSPORTATION PROVIDED BY A RAIL CARRIER.

In *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981), the ICC used its power under 49 U.S.C. 10505 to exempt both the rail and motor portion of TOFC and COFC transportation provided by rail carriers as part of a continuous intermodal move whether in interstate or intrastate commerce. The ICC's decision was upheld in *ATA*. Texas apparently concedes that *ATA* applies to both the rail and motor portion of interstate TOFC/COFC transportation provided by rail carriers and to the rail portion of intrastate TOFC/COFC transportation provided by rail carriers. Texas, however, does contend (supported by the

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[1] See pages 37a-39a Appendix To Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit (Appendix) for text of the statute.

court below) that *ATA* does not apply to the motor portion of intrastate TOFC/COFC transportation provided by a rail carrier.

This contention is not valid because under 49 U.S.C. 10505, the ICC's exemption power applies to matters relating to transportation provided by a rail carrier. The motor portion of intrastate TOFC/COFC service provided by a rail carrier is clearly a matter relating to transportation provided by a rail carrier. Therefore, under 49 U.S.C. 11501, the states are required to apply the full exemption as a Federal standard and procedure. *Illinois Central Gulf R.R. Co. v. ICC*, 702 F.2d 111 (7th Cir. 1983); *Wheeling Pittsburgh Corp. v. ICC*, 723 F.2d 346 (3rd Cir. 1983); and *Utah Power & Light Co. v. ICC*, 747 F.2d 721 (D.C. Cir. 1985), *supplemented on rehearing*, 764 F.2d 865 (D.C. Cir. 1985). Essentially, Texas argues that "transportation provided by a rail carrier" as used in 49 U.S.C. 10505 has one definition when referring to interstate TOFC/COFC transportation and another definition when referring to intrastate TOFC/COFC transportation. Railroads submit that such statutory construction and interpretation is not permissible under established precedent and is, indeed, contrary to Congressional intent.

A. The Statutory Construction and Interpretation Urged by Texas is Contrary to Established Precedent.

Under 49 U.S.C. 10505(a) the ICC, when certain circumstances exist, must grant an exemption in matters relating to a rail carrier providing transportation subject to the jurisdiction of the ICC. That authority specifically allowed the ICC ". . . to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement." (49 U.S.C. 10505[f]). The ICC has exercised that power. The ICC construed the provision above as in-

cluding both the rail and motor portions of TOFC/COFC transportation provided by a rail carrier.

In reviewing the ICC's construction of a statute that the ICC administers, the question is

> "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed in intent of Congress." *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-843, 81 L.Ed. 2d 694, 104 S.Ct. 2778 (1984).

In this case the intent of Congress is clear that "transportation provided by a rail carrier" includes both the rail and motor portion of intrastate TOFC/COFC transportation provided by a rail carrier. 49 U.S.C. 10102(25) provides that " 'transportation' includes

> (A) a locomotive, car, vehicle, motor vehicle, . . . related to the movement of passengers or property. . . ."

A matter relating to transportation provided by a rail carrier, therefore, includes a motor vehicle related to the movement of property operated by a rail carrier.[2] As found by the court in *ATA*, at p. 1120, Congress could easily have limited the ICC's authority to transportation in rail cars but did not do so. Having shown that transportation provided by a rail carrier includes both the rail and motor portion of a continuous intermodal move, the next step is to determine whether the ICC has authority over both intrastate and interstate transportation provided by a rail carrier.

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[2] The concept that transportation provided by a rail carrier can include motor vehicle service provided by a rail carrier is not new. Congress specifically adopted the concept in the Transportation Act of 1940, Ch. 722, 54 Stat. 920 (See 49 U.S.C. 10523).

49 U.S.C. 11501[3] embodies Congressional policy concerning ICC authority over intrastate transportation. Section 11501(b)(4)(B) provides that:

> "[a]ny intrastate transportation provided by a rail carrier in a state which may not exercise jurisdiction over an intrastate rate, clarification, rule, or practice of that carrier due to a denial of certification under this subsection shall be deemed to be transportation subject to the jurisdiction of the Commission under subchapter I of Chapter 105 of this title."

In other words, the ICC now has complete jurisdiction over Texas intrastate transportation provided by a rail carrier since the Railroad Commission of Texas (RCT) was denied certification by the ICC.[4] Texas intrastate transportation provided by a rail carrier is now deemed to be subject to ICC jurisdiction. Contrary to the argument that the RCT's decertification is immaterial, the lack of certification to regulate intrastate transportation provided a rail carrier is fatal to Texas' argument. In fact, even if the RCT was certified, it would be required to apply the exemption under 49 U.S.C. 10505 to both the rail and motor portions of TOFC/COFC intrastate transportation provided by a rail carrier.[5]

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[3] See Appendix pp. 30a-37a for text.

[4] *State Intrastate Rail Rate Authority—Texas*, 1 I.C.C. 2d 26 (1984), *aff'd* in *Railroad Commission of Texas v. United States*, 765 F.2d 221 (D.C.Cir. 1985) (*RCT*).

[5] See the unchallenged discussion regarding of *Illinois Commerce Commission v. ICC*, 749 F.2d 875 (D.C.Cir. 1984) *cert. den.* 106 S.Ct. 7 (1985), at pp. 14-16 of Railroads' opening brief. Since Texas did not challenge Railroad's position concerning this case, Railroads will not discuss it further in this reply brief.

B. Application of the Exemption to the Intrastate Motor Portion of TOFC/COFC Transportation Provided By a Rail Carrier is Consistent with Congressional Policy.

One of the major policies adopted by Congress in the Staggers Rail Act (Staggers Act)[6] was to alleviate the problem of "multiple and diverse regulations at the state level" faced by the railroad industry. H.R. No. 96-1035, 96th Cong. 2d Sess. 128 (1980). Section 214 (49 U.S.C. 11501) of the Staggers Act was the solution chosen by Congress and that section limits "[s]tate authority over intrastate transportation . . . to administering the provisions of the Interstate Commerce Act." H.R. Conf. Rep. 96-1430, 96th Cong. 2d Sess. (1980). The clearly enunciated Congressional intent was to:

> "ensure the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulations of rates, practices, etc., which are not in accordance with these goals. Accordingly, the Act preempts state authority over rail rates, classification, rules and practices. States may only regulate in these areas if they are certified under the procedures of this section." H.R. Conf. Rep. 96-1430, *supra*, p. 106.

Texas even concedes in its brief (p. 9) that Congress has preempted the economic regulation of intrastate transportation provided by a rail carrier. That concession should be dispositive since Railroads have shown and the court in *ATA* agreed, that the motor portion of TOFC/COFC service was encompassed in the Congressional definition of transportation provided by a rail carrier.

Further, to accept the Texas view that the motor portion of intrastate TOFC/COFC transportation provided by a rail carrier is actually motor carrier service would

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[6] Pub. L.No. 96-448, 94 Stat. 1895

frustrate the clearly enunciated policy of uniformity between interstate and intrastate regulation of transportation provided by rail carriers. Texas' argument that disparity between interstate and intrastate regulation of transportation provided by rail carriers is permitted by Congress is simply incorrect. As shown above, Congress has clearly mandated that there is to be uniformity between interstate and intrastate regulation especially when the state is not even certified to continue intrastate rail regulation.

II. THE PRACTICAL EFFECT OF TEXAS' POSITION IS TO PREVENT CONGRESSIONALLY MANDATED COMPETITION.

Congress decided in the Staggers Act that the government policy in regulating the railroad industry was to:

> "ensure the devolopment and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;" (49 U.S.C. 10101a[4]) and to
>
> "foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes; . . . ." (49 U.S.C. 10101a [5]).

If the position adopted by Texas and the court below is upheld, these policies will be frustrated. Texas has candidly conceded that its real purpose in seeking to regulate the transportation at issue is to prevent rail carriers from competing with intrastate motor carriers. At page 10 of its brief, Texas points out that if the motor portion was exempt, railroads would have an "unfair" competitive advantage over regulated intrastate motor carriers. Again at page 13 on its brief, Texas refers to "the devastation that such fleets of railroad-owned trucks could wreck upon

Texas' regulated motor carriers if permitted the unfair competitive advantage of deregulation."

These admissions by Texas are really quite astounding and are illustrative of the problems Congress sought to cure in preempting state regulation by states not certified because of a failure to follow Federal standards and procedures.[7] Texas apparently opposes the congressionally mandated policy of rail competition with motor carriers. Railroads submit that Congress, not Texas, has the power to make that decision and that Congress has chosen competition over economic regulation. That is the teaching of this Court's recent decision in *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 474 U.S. —, 106 S.Ct. 709; 88 L.Ed.2d 732 (1986) (*Transco*). Further, if the Texas motor carriers really were concerned about the transportation at issue here, one wonders why they have not bothered to appear at any stage of the ICC or court proceedings. In any event, their remedy would be to seek a revocation or modification of the exemption at the ICC pursuant to 49 U.S.C. 10505(d).

In reality, affirmance of the decision below would prevent rail carriers providing intrastate TOFC/COFC transportation from being effective competitors. At page 11 of their opening brief Railroads pointed out the effect of the disparate treatment of interstate and intrastate TOFC/COFC transportation by a rail carrier envisioned by Texas. It is quite interesting to note that Texas did not dispute the accuracy of the example or the real and tangible harm that would be suffered by Railroads if the decision below is upheld. Texas merely responds that such

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[7] The RCT was decertified precisely because of its failure to folow Federal Standards and procedures. See *RCT, supra.*, at pp. 224-226.]

results are Congressionally condoned. See Texas' brief p. 16. That position is totally wrong as has been discussed above.

III. RECENT DECISIONS OF THIS COURT DO NOT SUPPORT THE ARGUMENT MADE BY TEXAS.

Texas contends that this Court's recent decision in *Louisiana Public Services Com. v. FCC*, 476 U.S. —, 90 L.Ed.2d 369, 106 S.Ct. 1890 (1986)(*LPSC*) requires that the decision below be affirmed. Such a view is contrary to even a cursory review of the *LPSC* decision. In that case the FCC was attempting to compel the states to adopt FCC-set depreciation practices and schedules in connection with the setting of intrastate rates. This Court concluded the FCC did not have power to compel the states to adopt the FCC-set depreciation practices and schedules. The basis for the decision was a statutory provision denying the FCC jurisdiction with "respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ." 47 U.S.C. 152(b). In other words, the FCC was specifically prohibited from regulating the area it was trying to regulate —ie. intrastate communication service.

The situation at issue here is vastly different. The ICC here is specifically authorized by 49 U.S.C. 10505 and 11501 to regulate or exempt from regulation the motor portion of intrastate TOFC/COFC transportation by a rail carrier and the states are obligated to implement that exemption. Rather than being specifically prohibited from regulating the service, the ICC is authorized by Congress to regulate the transportation in question. Therefore, *LPSC* is not dispositive of the case before this Court.

Texas also asserts that Railroads' reliance on *Transco* is misplaced. See Texas' brief, pp. 19-20. *Transco* held

that a federal decision to forego regulation does not empower the states to step in and fill the regulatory void. Texas is, of course, attempting to do just that by trying to regulate the transportation at issue here. The basis for the *Transco* decision was that allowing the states to substitute economic regulation for a federal decision to let market forces control would disrupt the uniformity of federal regulatory policy and would raise the ultimate price to consumers.

The Congressional policy of uniformity between regulation of interstate and intrastate transportation provided by a rail carrier has been previously discussed. That discussion will not be repeated here other than to say the Texas position, if allowed to stand, would disrupt that policy.

The question of the ultimate price to the consumer is also relevant. If the Texas position is upheld, rail carriers will be forced to provide a higher cost service to intrastate shippers than to interstate shippers. If Texas is allowed to regulate the motor portion of intrastate TOFC/COFC transportation provided by a rail carrier, Railroads will either have to attempt to become certified motor common carriers or will have to use other certificated motor carriers to perform that function. Either way, Railroads will not be able to provide the competition envisioned by the Staggers Act.

Even though both interstate and intrastate TOFC/-COFC traffic moves in the same type of trailers or containers, on the same cars and in the same trains, the intrastate traffic will be subject to additional and, therefore, more costly handling. Also, rail carriers trying to compete for intrastate business to move in TOFC/COFC service will not have the flexibility to adjust prices to meet mar-

ket conditions. In other words, they will not have the flexibility they presently have in handling interstate TOFC/-COFC business. Texas still has not given any practical reason why there should be a difference and the decision below certainly offers no justification. In fact, Texas has not shown why a disparity of treatment is desirable as a matter of public policy. The Texas position is a throwback to the days of heavy handed economic regulation. Congress has decided to move away from those policies and Texas should not be allowed to frustrate that policy.

Texas desires to exercise economic regulation over rail carriers to protect intrastate motor carriers from competition. The result is to ultimately cost consumers more for transportation service than would be the case if the Congressional policy of reliance on competition was followed. Under *Transco*, Texas does not and should not have that option.

IV. CONCLUSION

For the reasons stated above, Railroads respectfully request the Court to reverse the decision below.

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Nos. 85-1222 and 85-1267

In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL., PETITIONERS

v.

STATE OF TEXAS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

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In the Supreme Court of the United States

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INTERSTATE COMMERCE COMMISSION, PETITIONER

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STATE OF TEXAS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

In our opening brief, we showed (Gov't Br. 21-26) that both the rail and truck portions of Plan II TOFC/COFC service—a single intermodal trailer-on-flatcar or container-on-flatcar service provided by a rail carrier on equipment owned and operated by the rail carrier—fall within the Interstate Commerce Commission's preemption power under the Staggers Rail Act of 1980, Pub. L. No. 96-488, § 214(b), 94 Stat. 1913 (49 U.S.C. 11501(b)).[1] We

[1] As we pointed out in our opening brief (Gov't Br. 19, 41-42 n.28), the preemption of state authority under Section 11501, together with the Commission's determinations under that section, ousts respondent of jurisdiction over the transportation in question, and the Section 10505 exemption power is not directly at issue. Nevertheless, the scope of the Commission's Section 10505 exemption authority, which extends to any "matter related to a rail carrier providing transporta-

also showed (Gov't Br. 26-34) that, when a rail carrier provides Plan II TOFC/COFC service, it is not, during the truck portions, transformed from a "rail carrier" into a "motor carrier" subject to the preservation of state authority in Section 10521(b).[2] We further explained (Gov't Br. 34-42) that the contrary view taken by the court of appeals would undermine the clear congressional policy of freeing rail carriers from burdensome state regulation.

Respondent concedes that the Commission's authority to oust state regulation extends not only to *all* rail transportation (Resp. Br. 9) but also to *inter*state movement by motor vehicle in connection with Plan II TOFC/COFC service (Resp. Br. 15).[3] Respondent argues, however, that the statutory scheme defining the Commission's authority does not encompass *intra*state motor transportation that is part of Plan II TOFC/COFC service. Respondent's arguments are without merit.

1. Respondent's primary contention (Resp. Br. 4-5, 6-7, 9, 12-16) is that, under the Interstate Commerce Act, 49 U.S.C. (& Supp. II) 10101 *et seq.*, all movement by motor vehicle is movement by a "motor carrier," and all movement by rail is movement by a "rail carrier." According

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tion subject to the jurisdiction of the Interstate Commerce Commission under this subchapter," is at least as large as the scope of the Secton 11501 preemption authority.

Unless otherwise indicated, "Section ____" hereafter refers to a section of Title 49 of the United States Code.

[2] The Commission's jurisdiction over rail carriers is given its core definition in Section 10501 and is generally provided for by subchapter I of chapter 105 of Title 49 of the United States Code, 49 U.S.C. 10501-10505. The Commission's jurisdiction over motor carriers is given its core definition in Section 10521 and is generally provided for by subchapter II of chapter 105, 49 U.S.C. 10521-10529.

[3] Respondent agrees (Resp. Br. 15) that the Fifth Circuit decision in *American Trucking Ass'ns* v. *ICC (ATA)*, 656 F.2d 1115 (1981), was correct insofar as it held that the Commission had authority to preempt state regulation of *inter*state motor vehicle movement in connection with TOFC/COFC service.

to this argument, all rail movement is subject to the Commission's rail carrier jurisdiction (subchapter I), while motor movement is subject to the Commission's jurisdiction, if at all, only under subchapter II, which reserves *intra*state motor carriage to the states (Section 10521(b)). Respondent therefore contends that the intrastate motor portion of Plan II TOFC/COFC service is not subject to the Commission's jurisdiction under either subchapter I or subchapter II.

Respondent's analysis is incorrect for two reasons. First, the statute does not establish a bright line excluding all motor vehicle movement from rail carrier jurisdiction and subjecting it exclusively to motor carrier jurisdiction. Instead, the motor vehicle movement involved in Plan II TOFC/COFC service is properly subject to the provisions of subchapter I and not subchapter II. Second, and in any event, respondent is mistaken in suggesting that the Staggers Act power to oust state regulatory jurisdiction over rail carriers extends only to a transportation service that would, by itself, subject a person to the Commission's subchapter I jurisdiction over rail carriers. In fact, this power extends to any "transportation provided by [an interstate] rail carrier" and thus includes the motor portion of Plan II TOFC/COFC service.

a. Respondent's assumption (Resp. Br. 5-8) that the statutory scheme embodies a rigid dichotomy between motor and rail movement is based almost entirely on a purportedly sharp division between motor and rail transportation under the version of the Interstate Commerce Act prior to its 1978 recodification. Respondent notes that the pre-1978 version of the Act contained separate definitions of "transportation" for rail carriers (49 U.S.C. (1976 ed.) 1(3)(a)) and motor carriers (49 U.S.C. (1976 ed.) 303 (a)(19)) and that the 1978 recodification was not intended to make any substantive change. But neither the pre-1978 version of the statute nor the current

version creates the compartmentalized regulatory scheme that respondent suggests. What this Court said, in another context, about the Communications Act of 1934, 47 U.S.C. (& Supp. II) 151 *et seq.*, applies to the Interstate Commerce Act: the statute does not "divide the world * * * neatly into two hemispheres * * *—in practice, the realities of technology and economics belie such a clean parceling of responsibility" (*Louisiana Public Service Comm'n* v. *FCC*, No. 84-871 (May 27, 1986), slip op. 3). In particular, truck service incidental to rail service is properly subject to subchapter I jurisdiction.

Section 10501(a)(1)(A) defines the Commission's jurisdiction under subchapter I, in relevant part, as applying to "transportation * * * by rail carrier * * * that is * * * only by railroad." This language, like its predecessors under the pre-1978 version of the statute, does not exclude the construction that subchapter I jurisdiction covers some non-rail movement when sufficiently connected to rail movement. To begin with, the term "transportation" is broadly defined by the statute to include movement by both motor vehicle and rail (Section 10102(25)).[4] In addition, the term "railroad," unlike most of the other terms defined by the Act but like "transportation," is given an open-ended definition by the statute (Section 10102(20)) that does not limit its reach to transportation on rails. The Act states only that the term "includes" certain rail-related items but otherwise leaves

[4] The pre-1978 definition of "transportation" for rail carriers (49 U.S.C. (1976 ed.) 1(3)(a)) encompassed both "all instrumentalities and facilities of shipment or carriage" and "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." The definition for motor carriers (49 U.S.C. (1976 ed.) 303 (a)(19)) was narrower, embracing only "vehicles operated by, for, or in the interest of any motor carrier * * * together with all facilities and property operated or controlled by such carrier."

the limits of the term's application unspecified.[5] "Transportation * * * only by railroad" accordingly is not restricted by statute to movement on rails.

Indeed, Section 10523(a) of the Act expressly places certain motor vehicle transportation—"in a terminal area"—under subchapter I jurisdiction. Moreover, and of critical importance, even before the predecessor of that section became part of the statute in 1940 (Pub. L. No. 76-785, ch. 722, § 17(b), 54 Stat. 920), the Commission had deemed its grant of jurisdiction under subchapter I to include some movement by motor vehicle.[6] In fact, even before the Commission had any jurisdiction over motor carriers at all,[7] the Commission had held that the entire Plan II TOFC/COFC service, including the motor portion, came within subchapter I jurisdiction over rail carriers. *Container Service,* 182 I.C.C. 653, 657 (1932); *Tariffs Embracing Motor-Truck or Wagon Transfer Service,* 91 I.C.C. 539, 547 (1924); see *Ex parte 230, Substitute Service—Piggyback,* 322 I.C.C. 301, 305 (1964); *Trailers On Flatcars, Eastern Territory,* 296 I.C.C. 219, 226-230 (1955). The Commission has adhered to that position for over half a century, during which time TOFC/COFC service has been widely offered (see, *e.g., Ex parte 230,* 322 I.C.C. at 305, 307), and Congress has apparently never indicated disapproval. As this Court said in *American Trucking Ass'ns, Inc.* v. *Atchison, T. & S.F. R.R.,* 387

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[5] The pre-1978 version of the Act likewise gave "railroad" and "transportation" open-ended definitions (49 U.S.C. (1976 ed.) 1(3)(a)).

[6] The pre-1978 version of the Act used the phrase "wholly by railroad" where the current version says "only by railroad" (49 U.S.C. (1976 ed) 1(1)(a)).

[7] The Commission obtained jurisdiction over motor carriers in the Motor Carrier Act of 1935, ch. 498, § 49 Stat. 543 *et seq.*

U.S. 397, 401 (1967), the Commission has long regarded TOFC/COFC service "as an adjunct of transportation by railroad—as a facility essentially of, by and for the railroads." This history refutes any suggestion that subchapter I jurisdiction is limited to movement on the rails.

Similarly, the use of motor vehicles by a rail carrier does not automatically subject the rail carrier to subchapter II motor carrier jurisdiction. As we explained in our opening brief (Gov't Br. 27-29), the technical statutory definitions of "motor carrier," "motor common carrier," and "motor contract carrier" (Section 10102(12), (13), and (14)) do not appear to encompass all motor vehicle transportation. In particular, they do not appear to include—or, at the least, need not be read as including—movement by motor vehicle that is part of Plan II TOFC/COFC service, because the shipper is not being offered motor vehicle transportation as such along any route. As with the construction of the rail carrier provisions, history confirms this view. If a rail carrier also became a motor carrier when offering Plan II TOFC/COFC service, it would have to file for a motor carrier certificate under Section 10921. Yet in the half century during which rail carriers have been offering such service, the Commission has not required such a certificate. Rather, Plan II TOFC/COFC service has always been offered under a rail carrier's tariff.

b. Even if respondent were correct that no motor vehicle movement is subject to the Commission's jurisdiction under Section 10501, the Commission's exemption and preemption powers extend beyond the limits of Section 10501. Contrary to respondent's contention, the transportation over which states may lose regulatory authority under the exemption and preemption provisions of the Staggers Act (Sections 10505 and 11501) need not, under the terms of the statute, be transportation that, by itself, would subject a rail carrier to the Commission's subchapter I jurisdiction.

Thus, Section 10505 authorizes the Commission to grant to certain persons, "in a matter related to" them, exemptions from any regulatory provision for any "person, class of persons, or * * * transaction or service." Similarly, Section 11501(b) preempts a state's authority over any "intrastate transportation" provided by certain persons unless the state complies with federal standards and procedures. It is only in identifying the person to whom those provisions apply, and not in specifying the activities being removed from state regulation, that a reference to subchapter I is made: the provisions apply to any person who is a "rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I" (Section 11501(b); see also Section 10505(a)).

This phrase can and should be read as a unit, synonomous with "interstate rail carrier" (see Gov't Br. 7 n.5). The subchapter I language identifies which rail carriers, not what kinds of transportation, are the subject of the provisions. Were it otherwise, Section 10505 could easily have said "In a matter related to transportation subject to * * *" rather than "In a matter related to a rail carrier providing transportation subject to * * *."[8] Indeed, Section 11501(b), which refers to "*intra*state transportation provided by a rail carrier providing transportation subject to [subchapter I jurisdiction]" (emphasis added), obviously refers to transportation that would not, by itself, subject the carrier to subchapter I jurisdiction, because ~~only~~ purely *intra*state transportation does not create Commission jurisdiction under Section 10501. The Commission's reading makes sense of Sections 11501 and 10505: the preemption provision applies to any "intrastate transportation" provided by an interstate rail carrier; and

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[8] In fact, even had Section 10505 been so written, the exemption authority would not be restricted to "transportation subject to [subchapter I]" but would extend to any "matter related to" such transportation.

the exemption provision applies to any person, class, transaction, or service in a matter related to an interstate rail carrier. Once the entity is properly identified as engaged in the activities that render it a rail carrier subject to subchapter I jurisdiction, the Staggers Act provisions do not require further reference to the jurisdictional provision of subchapter I. See *American Trucking Ass'ns, Inc.* v. *ICC*, 656 F.2d 1115 (5th Cir. 1981) (adopting that approach).[9]

Accordingly, the Staggers Act ousts state authority over transportation that would not, by itself, subject a rail carrier to Commission jurisdiction under Section 10501.[10] As we showed in our opening brief, the intrastate motor portion of Plan II TOFC/COFC service is certainly "intrastate transportation" provided by an interstate rail carrier within the meaning of Section 11501 (as well as a "matter related to [an interstate] rail carrier" under Section 10505). That conclusion, together with the conclusion (see Gov't Br. 26-34; page 6, *supra*) that Plan II TOFC/COFC service does not transform a rail carrier into a motor carrier, requires that the Commission's ruling in this case be upheld.

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[9] Of course, the exemption and preemption provisions may well be limited to transportation that is provided by an interstate rail carrier *as such* and thus be restricted to services adjunct to rail transportation. The motor portion of Plan II TOFC/COFC service obviously falls within any such limits.

[10] Indeed, respondent's concession that the Commission can oust states of jurisdiction over *inter*state motor vehicle movement, as the Fifth Circuit held in *ATA*, taken together with respondent's contention that no motor vehicle movement can be subject to the subchapter I rail carrier jurisdiction, itself implies that the Staggers Act provisions extend beyond transportation that would subject a rail carrier to subchapter I jurisdiction.

c. Not only does the statutory scheme easily support the Commission's action, but there are the strongest possible reasons in this case for deferring to the Commission's construction of the statute to permit preemption of state regulation of the truck portion of Plan II TOFC/COFC service. Most specifically, the Commission's view is supported by the long history, noted above, of the Commission's consistently taking this same position regarding the proper statutory classification of Plan II TOFC/COFC service. The Commission's interpretation of the statute is also overwhelmingly supported by the declared national policy (see Section 10101a) of eliminating economically unnecessary and burdensome regulation of rail carriers. Indeed, when enacting the Staggers Act in 1980, Congress knew of and supported the Commission's actions respecting TOFC/COFC service (H.R. Rep. 96-1035, 96th Cong., 2d Sess. 60 (1980)) and deliberately delegated to the Commission "the responsibility of actively pursuing exemptions" (*ibid.*), from rail regulation to "ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation" (H.R. Rep. 96-1430, 96th Cong., 2d Sess. 106 (1980)). Congress also expressly listed intermodal service as a candidate for exemption (Section 10505(f)). The Commission's decision interprets the statutory scheme to give effect to Congress's clear goal of encouraging exemption of specific services, including intermodal service, when needed to promote competition and to return rail carriers to financial health (See Gov't Br. 36-41).

More generally, the Commission is the agency charged with administering the complex scheme of federal regulation of various forms of transportation. This Court has long recognized that deference is due an agency in these circumstances when the agency's decision "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute"

(*United States* v. *Shimer*, 367 U.S. 374, 383 (1961); see *United States* v. *City of Fulton*, No. 84-1725 (Apr. 7, 1986), slip op. 9-10; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-845 (1984)). The Commission's decision in this case is a reasonable accommodation—indeed, an accommodation clearly supported by congressional policy[11]—of different, if not conflicting, policies regarding motor- and rail-carrier regulation as applied to a service involving both motor and rail transportation.

Finally, this Court has in various contexts held that deference to the Commission in construing its authority under the Interstate Commerce Act is especially great. Thus, the Court has long recognized that "[t]he Commission's authority under the Interstate Commerce Act is not bounded by the powers expressly enumerated in the Act" and that, under the "doctrine of ICC discretion," the Commission "has discretion to take actions that are legitimate, reasonable, and direct[ly] adjunct to the Commission's explicit statutory power" (*Interstate Commerce Comm'n* v. *American Trucking Ass'ns, Inc.*, 467 U.S. 354, 364-365 (1984) (internal quotation marks omitted). Because "[t]he very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms" (*United States* v. *Pennsylvania R.R.*, 323 U.S. 612, 616 (1945)), the Court has rejected "arguments based upon arguable inference from nonspecific statutory language, limiting the Commission's power to adopt rules which, essentially, reflect its judgment in light of current facts as to the proper interrelation-

[11] As we noted in our opening brief (Gov't Br. 26 n. 17), Congress also adopted a policy of seeking to reduce the regulatory burden on motor carriers when it enacted the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *et seq.*. Moreover, in declaring "transportation policy" for the entire Interstate Commerce Act, Section 10101(a) expressly gives priority to the specific transportation policies promoting deregulation of rail carriers set out in Section 10101a.

ship of several modes of transportation" (*American Trucking Ass'ns, Inc.* v. *Atchison, T., & S.F. R.R.*, 387 U.S. at 410). The Court has thus "accorded the Commission latitude to interpret its statutory powers in a reasonable manner" (*Interstate Commerce Comm'n* v. *American Trucking Ass'ns, Inc.*, 467 U.S. at 365). The Commission's decision in this case marking the boundary between motor carrier and rail carrier regulation with respect to one form of intermodal service is reasonable and should be upheld.

2. Respondent's additional arguments challenging the Commission's decision do not undermine or weaken this conclusion. To begin with, respondent's suggestion that "preemption analysis" governs disposition of this case (Resp. Br. 8-12) is incorrect. The Commission expressly preempted respondent's regulation of Plan II TOFC/COFC service. The only question in this case, therefore, is a question of federal statutory interpretation—whether the Commission's ouster of state jurisdiction over Plan II TOFC/COFC service is authorized by the Interstate Commerce Act, as amended by the Staggers Act. As we have shown, the Staggers Act authorizes the Commission's action. There is no occasion to consider more indirect forms of preemption of state law.[12]

For much the same reason, respondent's reliance on *Louisiana Public Service Comm'n* v. *FCC, supra* (Resp. Br. 20), is misplaced. This Court, citing an express and

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[12] Even if preemption analysis were appropriate, the question "whether Congress intended that federal regulation supersede state law" (*Louisiana Public Service Comm'n* v. *FCC*, slip op. 13) has a clear answer in this case. As we showed in our opening brief (Gov't Br. 34-42), and as Section 11501 plainly reveals, Congress enacted the Staggers Act with the specific intent of eliminating the burden of state regulation on rail carriers. "[A] clear federal intent to leave an area *un*regulated has as much preemptive effect as an affirmative federal decision *to regulate.*" Resp. Br. 19 (citing *Transcontinental Gas Pipe Line Corp.* v. *State Oil and Gas Bd.*, No. 84-1076 (Jan. 22, 1986)).

sweeping "*denial* of power to the FCC" (slip op. 18 (emphasis in original)), there rejected the Federal Communications Commission's claim of implied power under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, to preempt certain state depreciation practices. The decision in the case depended on the particular statutory scheme at issue, a scheme entirely different from that at issue here. As we have shown, the Staggers Act expressly provides for preemption of state regulation of intrastate transportation (Section 11501) and authorizes the Commission decision under review. The Court's construction of the Communications Act in *Louisiana Public Service Comm'n* cannot resurrect respondent's otherwise unpersuasive arguments about how to construe the Staggers Act.

Respondent's argument (Resp. Br. 7-8) that the Commission's "expansive reading" of its Staggers Act authority threatens state police power is patently meritless. The exemption and preemption powers extend, as respondent itself acknowledges with respect to intrastate *rail* traffic, only to "economic regulation" (Resp. Br. 9)—principally, licensing of entry and rate regulation. This limitation merely reflects the limits of the Interstate Commerce Act itself, which simply does not encompass traditional police power regulation of health and safety. The preemption provision refers only to "intrastate rates, classifications, rules, and practices" (Section 11501(b)(2)) and to "intrastate regulatory *rate* standards and procedures" (Section 11501(b)(3)(A) (emphasis added)). Section 10501(d), which provides that Commission and state jurisdiction over rail carrier transportation is exclusive, likewise indicates the limited scope of authority at issue here: if traditional police power regulation were within the Commission's authority, then federal agencies other than the Commission would be unable to exercise much of the regulatory authority they in fact exercise over

transportation-related activities by rail carriers (*e.g.*, occupational safety and health, securities, environmental hazards, even air safety). See, *e.g,. Professional Drivers Council* v. *Bureau of Motor Carrier Safety,* 706 F.2d 1216, 1217 n.1 (D.C. Cir. 1983) (federal power over drivers' hours of service vested in Department of Transportation). Finally, there is nothing in the legislative history of the Staggers Act to show that traditional state police power regulation was to be preempted under Section 11501. In sum, the Commission's construction of the Staggers Act does not threaten state regulation of "insurance and hours of driver operation requirements" or limits on "overweight and oversize vehicles" or "licensing and vehicle safety inspection" (Resp. Br. 7-8). Cf. *Kassel* v. *Consolidated Freightways Corp.,* 450 U.S. 662, 671 n.11 (1981) (state regulation of length of truck trailers subject to constitutional Commerce Clause limitations).

Respondent's attempt to resurrect the Fifth Circuit's scenario of an intrastate rail carrier that provides rail service as an incidental aspect of what is primarily motor carriage (Resp. Br. 12-14) likewise does not undermine the Commission's reading of the statute. Respondent nowhere explains how such an *intra*state rail carrier could ever come under the Commission's jurisdiction and, hence, its exemption authority (see Gov't Br. 36). And respondent offers no persuasive reason to question the Commission's good faith in detecting and controlling subterfuges or excesses. Repondent points only to the now-defunct operations of Road-Rail as an example of Commission-approved excess (Resp. Br. 13-14). As we pointed out in our opening brief (Gov't Br. 16 n.12), however, the Commission, in the Road-Rail proceeding (85-1222 Pet. App. 24a-29a), was never asked to address and never addressed any contention that the relative proportion of motor and rail movement in Road-Rail's service deprived it of the Plan II TOFC/COFC exemption.

In any event, if the Commission preempts state regulation of a particular transportation service that respondent believes is not properly covered by the Staggers Act, respondent may challenge the Commission's decision, and a Commission order dismissing an administrative complaint would be reviewable in the courts. See 49 U.S.C. 11701; *Southern R.R.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-455 (1979). Thus, the outer limits of the exemption for motor vehicle movement that is adjunct to rail movement can be established in the future by the Commission and the courts. That the limits have not yet been established is no reason to reject an otherwise reasonable construction of the statute permitting exemption for motor vehicle movement clearly within any such limits.

Finally, respondent's policy argument (Resp. Br. 16-18) that "the practical impact is minimal" cannot support its restrictive construction of the Staggers Act. Respondent asserts that the economic impact of reversing the Commission in this case would be small, because respondent does not regulate motor transportation within "commercial zones," which cover the major metropolitan areas. This argument, however, is contradicted by respondent's own contention that the Commission's ruling threatens "devastation" of intrastate Texas motor carriers (Resp. Br. 13). Moreover, the argument has no bearing on the question of statutory interpretation before this Court, and it is inconsistent with the categorical decision made by Congress when it enacted the Staggers Act in 1980.

The preemption provisions of the Staggers Act oust a state of jurisdiction unless the state obtains certification from the Commission that its proposed exercise of jurisdiction is consistent with federal standards (Section 11501). When a state proposes to impose non-complying regulations, the Staggers Act does not call for case-by-case judgments that, one year, would sustain the state's exercise

of authority because the impact is minimal and, the next year, would invalidate the state authority because the state had changed its regulations. Faced with overwhelming evidence of burdensome state regulation (see Gov't Br. 34-35, 37-38), Congress adopted a more categorical solution, which simply requires a determination whether the state's proposed exercise of jurisdiction is inconsistent with federal standards. Respondent failed that test, because, among other reasons, state regulation of the intrastate motor portions of Plan II TOFC/COFC service imposes precisely the sort of regulatory burden, and creates precisely the sort of regulatory disparities, that Congress intended to eliminate when it enacted the Staggers Act (Gov't Br. 39-40).

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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